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No. 10

In the Supreme Court of the United States

PAT QUINN, GOVERNOR OF THE STATE OF ILLINOIS,
PETITIONER,

v.

GERALD A. JUDGE, DAVID KINDLER, AND ROLAND W. BURRIS, U.S. SENATOR, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

Attorneys for Petitioner

QUESTION PRESENTED

Whether, contrary to longstanding practice and the laws of many States, the Seventeenth Amendment requires a special election to fill a vacant Senate seat "every time that a vacancy happens in the state's senate delegation"—as the decision below holds—even where the vacated term will expire in the normal course following the next, biennial Congressional election.

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PETITION FOR A WRIT OF CERTIORARI

Pat Quinn, Governor of the State of Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a-40a) is reported at 612 F.3d 537 (7th Cir. 2010). That court's order amending its opinion on denial of rehearing (App. 60a-63a) is unpublished but reported at 2010 WL 2853645 (7th Cir. Jul. 22, 2010). The memorandum opinion of the United States District Court for the Northern District of Illinois (App. 41a-59a) is unreported.

JURISDICTION

The court of appeals entered judgment on June 16, 2010, and denied petitioner's timely petition for rehearing on July 22, 2010. On October 19, 2010, Justice Kagan extended until December 19, 2010, the time within which to file a petition for writ of certiorari. Because December 19 falls on a Sunday, this petition is timely filed on Monday, December 20, 2010. See SUP. CT. R. 30.1. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In relevant part, the Seventeenth Amendment to the United States Constitution provides:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

The Illinois Election Code provides:

> When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

10 ILCS 5/25-8 (2008).

STATEMENT

The decision below construes the Seventeenth Amendment to impose a newfound obligation on the States, one that conflicts with this Court's precedent and departs sharply from historical practice and extant law in many States. Without this Court's intervention, the court of appeals' decision will unsettle the law on an issue of importance to voters, candidates, and States nationwide.

1. Effective November 16, 2008, President-elect Barack Obama resigned his seat in the United States Senate, with two years and 48 days remaining on his Senate term. App. 3a. Pursuant to authority conferred on the State by the Seventeenth Amendment, Illinois law authorizes the Governor to appoint a replacement Senator in the event of such a vacancy, see 10 ILCS 5/25-8 (2008), and on December 31, 2008, then-Governor Rod Blagojevich appointed Roland Burris to the vacant seat. App. 3a. Mr. Burris was sworn in as a U.S. Senator on January 15, 2009. App. 4a. Under Illinois law, Senator Burris would have served out the remainder of President Obama's original Senate term—*i.e.*, until the new six-year Senate term begins on January 3, 2011.[1]

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[1] Section 25-8 of Illinois' Election Code provides that a Senate vacancy shall be filled by appointment until the next biennial Congressional election, at which point the Senator

2. Shortly thereafter, respondents Gerald Judge and David Kindler, Illinois voters, filed suit against petitioner Governor Pat Quinn in the U.S. District Court for the Northern District of Illinois, alleging that § 25-8 violates the Seventeenth Amendment by permitting a Governor's Senate appointee to serve for an improperly long period of time, and by not requiring the Governor to issue a writ of special election to fill the seat.[2] App. 5a. Respondents sought a declaration that § 25-8 violates the Seventeenth Amendment and an injunction directing petitioner to "'issue a writ for a special election to be conducted as soon as practical to fill the vacancy.'" App. 4a, 5a. Respondents also moved for a preliminary injunction ordering petitioner to "'issu[e] a writ setting an election to fill the vacancy in the Senate seat, not in November, 2010,'" as Illinois law required, "'but at the earliest practical date.'" App. 5a.

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elected "shall take office as soon thereafter as he shall receive his certificate of election." 10 ILCS 5/25-8 (2008). Petitioner reads this provision to require an election to fill a vacancy before a Senate term's expiration unless, as here, the term naturally expires the January following the next general election.

[2] As used herein, "respondents" refers to plaintiffs Judge and Kindler. Though technically a respondent, see SUP. CT. R. 26.1, Senator Burris (like petitioner) was a defendant below, and the petition refers to him by name, rather than as "respondent," to avoid confusion.

Petitioner moved to dismiss the complaint, and Senator Burris was joined as a required party under Federal Rule of Civil Procedure 19. App. 5a, 44a.

Respondents replied, and their reply brief raised a new constitutional claim: that § 25-8 violates the Seventeenth Amendment because it requires petitioner to appoint an interim Senator, rather than giving him the choice *whether* to do so. App. 6a. Respondents also changed their request for preliminary injunctive relief from a demand for a prompt special election, to one "'on a reasonable, but relatively early date,'" or at least an order directing petitioner "'to exercise his discretion by acting to set some date for a special election.'" App. 6a.

In a memorandum opinion and order filed on April 16, 2009, the district court denied respondents' motion for preliminary injunction and dismissed their complaint without prejudice.[3] App. 6a. The court declined to address respondents' new theory, raised for the first time in their reply brief, that § 25-8 runs afoul of the Seventeenth Amendment by forcing petitioner to appoint a replacement Senator, and the court rejected respondents' original claim that the time between

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[3] Respondents have since filed an amended complaint, raising, among other claims, the constitutional theory first advanced in their reply brief in support of their motion for preliminary injunction, and this complaint remains pending in the district court.

President Obama's Senate resignation and the next general election on November 2, 2010 was unreasonably long. App. 6a, 49a-50a & n.7, 57a-58a.

For the latter holding, the court relied heavily on *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), aff'd, 393 U.S. 405 (1969) (*per curiam*), which "[b]oth parties acknowledge[d] * * * [was] central to this case." App. 51a. There, in a decision summarily affirmed by this Court, a three-judge district court rejected a Seventeenth Amendment challenge to New York's law for filling Senate vacancies, which did not permit voters to elect a replacement Senator following Robert Kennedy's assassination in 1968 until the 1970 general election, 29 months after Senator Kennedy's death. *Ibid.* As the district court in this case recognized, *Valenti* "expressly rejected the argument that the Seventeenth Amendment requires a special election," and stressed the several "'substantial state interests'" advanced by waiting to fill a vacant Senate seat until the next, biennial Congressional election date. App. 52a-53a. The district court also cited this Court's reliance on *Valenti* as "relevant and persuasive" authority in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), which upheld Puerto Rico's law permitting political parties to appoint interim replacements to vacant seats in the Puerto Rico legislature. App. 55a-56a.

The district court concluded that "*Rodriguez* and *Valenti* squarely contradict [respondents'] textual interpretation, pursuant to which they argue that Illinois *cannot* 'forgo a special election in favor of a temporary appointment.'" App. 57a (quoting *Rodriguez*, 457 U.S. at 11) (emphasis in original). Because the period between President Obama's Senate resignation and the next Congressional election in November 2010 was shorter than the 29 months upheld in *Valenti*, the court rejected respondents' constitutional challenge, dismissed their complaint without prejudice, and denied their motion for preliminary injunction. App. 57a-59a.

3. Respondents appealed, and although the Seventh Circuit affirmed the denial of their motion for preliminary injunction (because respondents could not show irreparable harm, App. 39a-40a) the court used its discussion of respondents' likelihood of success on the merits to order "two elections" for the same Senate seat on November 2, 2010. Specifically, the court ordered a regular election for the new, six-year term beginning in January 2011, and a special election for the remaining weeks of President Obama's original Senate term, App. 38a, relief that the parties had not addressed in their briefs or at oral argument. Respondents did not urge, and the court did not find, that the less than 27 months between President Obama's Senate resignation and January 2011 was an unconstitutionally long period for a gubernatorial appointee to serve. App. 20a. Rather,

the Court announced a rule that, under the Seventeenth Amendment, "*every* time that a vacancy happens in the state's senate delegation, the state must hold an election in which the people elect a permanent replacement to fill the vacant seat," App. 33a (emphasis added), even where, as here, the vacated term was ending and a successor would be elected at the next general election without conducting a separate, special election, App. 37a-38a.

Although the court acknowledged the possibility of a *de minimis* exception to its rule, it was "not prepared" to conclude that the period at issue here—the weeks between the certification of the winner of a November 2 special election and the swearing in of the new Congress on January 3, 2011—was *de minimis*. App. 37a. The court also conceded that its new rule was impossible to square with historical practice, whereby many replacement Senators (including the appointee in *Valenti* itself) served until the new Senator was sworn in for his or her full, six-year term. App. 36a-37a. The court further acknowledged that its novel rule would invalidate laws in States that expressly permit a Senate appointee to serve out the remainder of a Senate term when a vacancy arises sufficiently close to the term's natural expiration date. App. 35a (citing Connecticut statute).

Finally, though the court did not resolve "how the state is to decide whose names should be on the

November 2 ballot for the Obama vacancy," the opinion called for a "solution [that] complies with Illinois and federal law" and indicated that, "[h]owever Illinois conducts its election for the vacancy, the replacement senator presumably would present his or her credentials to the Senate and take office immediately, while the senator elected to begin service with the 112th Congress would not take office until January 3, 2011." App. 37a-38a.

4. Petitioner timely moved to amend the panel opinion or, alternatively, for rehearing by the full court *en banc*. The panel had decided an issue that the parties had not addressed, petitioner explained, and the court had committed errors of federal and state law in deciding to order two elections for the same Senate seat on the same day. Petitioner argued that the Seventh Circuit's new rule was impossible to square with this Court's ruling in *Rodriguez*, threatened to confuse voters and to leave an Illinois House district entirely unrepresented (if the Representative from that district won the special Senate election, as he ultimately did, and therefore needed to vacate his House seat *before* January 3, 2011 under the Seventh Circuit's decision), and would facially invalidate the laws of many States if applied in their circuits. Under Illinois law, moreover, the winner of a November 2 special election would not be certified until early December, meaning voters would have to endure the foregoing costs in exchange for a

truly *de minimis* period of service (roughly one month) by a specially elected Senator.

On July 22, 2010, the court declined to rehear the appeal *en banc*, but the panel corrected its earlier "presum[ption]" that the winner of a November 2 special election "would present his or her credentials to the Senate and take office immediately." App. 61a. Petitioner had shown that Illinois law gave election officials at least until early December to certify election results, and the panel amended its opinion to make clear that the State may have to "disregard provisions of state law that otherwise might ordinarily apply" to certify the special election results "as soon as possible, so that the replacement senator may present his or her credentials to the Senate and take office promptly." App. 62a-63a.

5. The parties and the district court took several steps to comply with the Seventh Circuit's ruling. On July 29, 2010, petitioner issued a writ, calling a special Senate election for November 2, 2010, "[b]ecause * * * the United States Court of Appeals for the Seventh Circuit has ruled that a writ of election must issue authorizing a special election to select a successor Senator to serve for the remainder of President Obama's original senate term." Jul. 29, 2010 Writ of Election. And, following several hearings, the district court entered an injunction specifying the manner in which the special election would be conducted, including the fact that the same list of candidates that would

appear for the regularly scheduled Senate election would be used for the simultaneous, special election. Aug. 2, 2010 Permanent Injunction Order. At the November 2 general election, therefore, Illinois voters cast ballots for both an interim Senator and a Senator for the full term beginning on January 3. Then-Congressman Mark Kirk won both elections, and he resigned his House seat and assumed President Obama's vacated Senate seat on November 29, 2010,[4] leaving Illinois' Tenth Congressional District unrepresented until Senator Kirk's successor takes office on January 3, 2011.

6. Meanwhile, petitioner filed a notice of appeal from the district court's permanent injunction order on September 1, 2010. That appeal is stayed pending resolution of this certiorari petition.

Senator Burris appealed separately from the district court's permanent injunction order, arguing that the order resolved a nonjusticiable political question, intruded on the prerogative of the Illinois legislature, and violated Senator Burris' ballot-access rights. See *Judge v. Quinn*, 624 F.3d 352, 357 (7th Cir. 2010). Pursuant to Supreme Court Rule 11, Senator Burris filed a certiorari petition with this Court on September 15, 2010, before the Seventh Circuit entered judgment

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[4] See http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000360.

on his appeal. On September 24, 2010, the Seventh Circuit affirmed the district court's permanent injunction order. *Judge*, 624 F.3d at 362. Senator Burris' certiorari petition remains pending.

REASONS FOR GRANTING THE PETITION

This case poses a recurring constitutional question of critical importance to voters nationwide. The opinion below announces a new constitutional mandate, one that is impossible to square with the three-judge district court's decision in *Valenti,* conflicts squarely with this Court's decision in *Rodriguez* and—as the court of appeals itself acknowledged—would declare pervasive and longstanding state practices unlawful and invalidate election laws in many States. The court of appeals' decision puts States in the untenable position of having to choose between their laws and practices, and the need to avoid voter confusion and other voter harm, on the one hand, and a constitutional command, newly declared by a federal court of appeals, on the other.

As this Court's cases demonstrate, the Seventeenth Amendment does not support the holding below. The Amendment's proviso authorizes States to avoid simultaneous elections for the same Senate seat, as Illinois had hoped to do here, by permitting a Senator appointed sufficiently close to the end of a term to serve out its remainder. And even if the Amendment required

the writ in every instance, a *de minimis* exception would apply where, as here, the vacated term would expire following the next general election. The Court should grant the certiorari petition and overturn the court of appeals' novel construction of the Seventeenth Amendment.

I. The Decision Below Conflicts With This Court's Established Construction Of The Seventeenth Amendment.

The Seventh Circuit's decision is impossible to reconcile with the reasoning in *Valenti*, and it conflicts squarely with *Rodriguez*, where this Court, relying on *Valenti* and its logic, made clear that the Seventeenth Amendment permits States "to forgo" a special election entirely in some cases. Certiorari review is necessary to address this conflict on an issue of substantial public importance.

1. In *Valenti*, the three-judge court held that waiting to elect a new Senator until the next general election—29 months after Senator Kennedy's assassination in June 1968, which was too soon before the upcoming democratic primary to elect a replacement Senator at the November 1968 Congressional election, 292 F. Supp. at 853—fully complied with the Seventeenth Amendment.[5] The court squarely rejected

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[5] Although this Court's summary affirmance in *Valenti* has less precedential value than an opinion in an argued case, see *Southern Ry. Co. v. Seaboard Allied Milling Corp.*,

the argument that the Amendment's proviso—which authorizes a Governor to appoint only a "temporary" replacement to a vacant seat—required a more immediate election.

Although this appeal no longer involves any challenge to the *length* of the appointee's term of service, as opposed to whether there must be a special election at some point for every vacancy, see App. 7a, *Valenti* is at odds with the Seventh Circuit's decision on two grounds. First, *Valenti* anticipated that the rule it announced would permit an appointee "to serve out the remainder of a [Senate] term," so long as that appointment was not of excessive duration. 292 F. Supp. at 856 ("We would have difficulty, for example, squaring the word 'temporary' with a statute providing that the Governor's appointee is to serve out the remainder of a term *regardless of its length*." (emphasis added)). This understanding of the Seventeenth Amendment is impossible to square with the rule announced below, which requires a special election "every time that a vacancy happens in the state's senate delegation," App. 33a, and therefore prohibits an

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442 U.S. 444, 463 (1979), the Court in *Rodriguez* read *Valenti* as a decision on the merits, see 457 U.S. at 10-11, as the court below recognized, see App. 20a n.2. The federal courts of appeals have similarly treated *Valenti* as a decision on the merits. See *Donatelli v. Mitchell*, 2 F.3d 508, 517 (3d Cir. 1993); *Lynch v. Ill. State Bd. of Elec.*, 682 F.2d 93, 96-97 (7th Cir. 1982).

appointee from ever serving out the remainder of the vacated term.

Second, in upholding the 29-month delay in that case, the court in *Valenti* relied heavily on States' historical practice as a "persuasive guide to constitutional construction," 292 F. Supp. at 858, and on the many advantages for voters, candidates, and States in waiting until the next general election: (1) in the run-up to general elections, "voter interest and turnout are at a maximum," making this "a more desirable time to fill as important an office as United States Senator"; (2) "it would be considerably more difficult for Senate candidates to finance a campaign in an off-year"; and (3) experience has shown "that the inconvenience and expense to the state of" having an off-year special Senate election "outweigh[s] any advantages to be derived from having a more prompt vacancy election." *Id.* at 859-860. The decision below undercuts *Valenti* by penalizing the at least 30 States that follow its lead and wait until the next biennial Congressional election to elect a replacement Senator. See U.S. Senate Committee on Rules & Administration, SENATE ELECTION LAW GUIDEBOOK 2006, at 181-251; see also *infra* pp. 17-20.

2. The decision below also conflicts squarely with *Rodriguez*, in which this Court relied on *Valenti* to uphold a Puerto Rico law under which a deceased legislator's political party selected his replacement to serve the more than three years remaining on his term. 457 U.S. at 3 & n.1. Because the case did not involve a U.S. Senate election, the Seventeenth Amendment did not control directly, but the Court relied heavily on the

Amendment, as interpreted in *Valenti*, to uphold Puerto Rico's law. *Id.* at 10-12. The Court reasoned that, if the Seventeenth Amendment "permits a state * * * to forgo a special election in favor of a temporary appointment to the United States Senate," then this "suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature." *Id.* at 4, 11.

Accordingly, *Rodriguez* upheld "[t]he Commonwealth's choice to fill legislative vacancies by appointment *rather* than by a full-scale special election." *Id.* at 12 (emphasis added). This was so even though the challenged Puerto Rico law, which the Court quoted in full, permitted the replacement legislator to remain in "'office until the term of his predecessor has expired.'" *Id.* at 3 n.2.

The Court's holding in *Rodriguez* would have been impossible under the Seventh Circuit's construction of the Seventeenth Amendment. That construction requires a special election "every time that a vacancy happens," App. 33a, and, by extension, would void a law like Puerto Rico's, which allowed the government to "forgo a special election" and authorized the appointee to serve "'until the term of his predecessor has expired.'" The conflict between the decision below and *Rodriguez* is alone grounds for this Court's review.

II. The Question Presented Is An Important And Recurring One.

If left undisturbed, the decision below threatens election practices nationwide. Most obviously, the Seventh Circuit's rule would facially invalidate election laws in at least 13 States, which in some circumstances permit the Governor's appointee to serve out the remainder of a vacated Senate term.[6]

1. More broadly, most States have laws, like the one upheld in *Valenti*, that advance the "substantial state interests" identified in that decision by permitting the Governor's appointee to serve through the next biennial Congressional election, see *supra* p. 15, and the decision below penalizes that approach. The court of appeals' new rule—and the court acknowledged that its holding runs contrary to the way that States have filled many Senate vacancies historically, App. 36a—requires States that follow *Valenti* to elect *two* Senators for the same seat at the next general election whenever, as here, a vacancy arises during the final two years of the Senate

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[6] See CAL. ELEC. CODE § 10720 (West 2009); CONN. GEN. STAT. ANN. § 9-211 (West 2010); LA. REV. STAT. ANN. § 18:1278(C) (West 2009); MD. CODE ANN., ELEC. LAW § 8-602(a)(3) (West 2010); MISS. CODE ANN. § 23-15-855(2) (West 2010); NEB. REV. STAT. § 32-565(2)(a) (2009); N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2010); N.D. CENT. CODE § 16.1-13-08 (2009); OHIO REV. CODE ANN. § 3521.02 (West 2010); S.C. CODE ANN. § 7-19-20 (2010); S.D. CODIFIED LAWS § 12-11-6 (2010); W. VA. CODE § 3-10-3 (2010); WYO. STAT. Ann. § 22-18-111(a) (2009).

term. This imposes substantial new burdens on voters and States alike.

First, the rule risks significant voter confusion. "Avoiding voter confusion is * * * a compelling state interest," *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) (citing *Bullock v. Carter*, 405 U.S. 134, 145 (1972)), and having two elections for the same seat on the same day is likely to dissuade some voters from selecting anyone from the list that appears second on the ballot. Historical election returns support this prediction. In 1970, a court order required Illinois to conduct two elections on the same ballot for the same seat in the U.S. House of Representatives. See *Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (1970). As in this case, one election was for the remainder of the original term, while the other was for the full term beginning the following January. *Ibid.* More people voted for candidates to fill the remaining portion of the then-current term than voted to elect a House member for the full, upcoming term, presumably because the choices appeared in that order on the ballot. See Sep. App. in Supp. of Mot. to Amend Op. or for Rehearing *En Banc* at 40-41 (reproducing 1970 ballot and election results, showing 123,695 total votes cast in special election, but only 121,424 votes cast in election to fill seat for full, two-year term). The results were even starker this year, where between 4 and 5% more people voted in the first-listed Senate race (the race for the full term appeared first this time) than in the second.[7] While one could

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[7] Compare http://elections.il.gov/Downloads/ElectionInformation/VoteTotals/2010GEOfficialVote.pdf

offer a variety of speculative explanations for this voter behavior, it is impossible to avoid the most obvious explanation—that many voters were disenfranchised because they did not understand why they were asked to pick from the same list of names twice for the same seat.

Second, the Seventh Circuit's rule frequently will leave many constituents unrepresented. More than forty members of the Senate of the 111th Congress came to that body directly from the House of Representatives,[8] as now-Senator Kirk did when he succeeded Senator Burris. Under the new rule announced in this case, however, Senators in this position who win a special election must abandon their House seats prematurely, leaving constituents in their districts entirely unrepresented in that body until January. See generally *Valenti*, 292 F. Supp. at 863 ("a vacancy in the House * * * leaves the affected district's residents completely without representation"). This is precisely what occurred in Illinois, where compliance with the Seventh Circuit's new constitutional

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(official totals for election for full, six-year term, showing 3,704,473 total votes), with http://elections.il.gov /ElectionInformation/GetVoteTotals.aspx (select "Special General Election 2010" then "United States Senator") (official totals for special election, showing 3,545,984 total votes).

[8] See http://senate.gov/pagelayout/reference/three_column_table/Senators.htm (follow links to biographies of Class I, II, and III Senators).

requirement left the citizens in Senator Kirk's former House district without representation in that chamber.

Finally, the decision below permits candidates to double normal federal campaign funding limits. Federal law limits direct, individual campaign contributions to $2,400 per person, per candidate, per election. See 2 U.S.C. §§ 441a(a)(1)(A), (c). But because the Seventh Circuit ordered *two* Senate elections for the same day, individuals could (and did) double their personal contributions.[9] See 2 U.S.C. § 431(1)(A) (defining an "election" eligible for donations as "a general, special, primary, or runoff election").

2. These adverse effects of the Seventh Circuit's new rule will be widespread. States' use of the Seventeenth Amendment's vacancy-filling provisions is commonplace, and the question that this case poses can be expected to arise in conjunction with fully one-third of those vacancies—namely, those that occur during the final two years of a Senate term.

Since the beginning of 1913, the year that the Seventeenth Amendment was ratified, 188 Senators have been appointed to fill Senate vacancies, and 46 States have appointed at least one Senator in that

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[9] For a list of contributions for the special and general Senate elections, see http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml (follow "Candidate Search" link and subsequent prompts).

time.[10] More than one-fifth of the Senators who began their Senate tenure between January 1, 1913 and January 1, 2011 started out as appointees.[11] And these figures ignore so-called "technical resignations," a practice—discontinued in 1980—whereby outgoing Senators would resign after a successor was elected to enable the Governor to appoint the new Senator-elect to the vacancy, thus gaining a few days' or weeks' seniority over the rest of the incoming freshman Senators. See Thomas Neale, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, FILLING U.S. SENATE VACANCIES: PERSPECTIVES AND CONTEMPORARY DEVELOPMENTS 7 (2009).

This year alone illustrates the regularity with which the issue presented here arises. Two of the Senators now completing service in the 111th Congress were appointed to serve out the remainder of a vacated term ending January 3, 2011: Senator George S. LeMieux of Florida, appointed on September 10, 2009,[12] and Senator Michael F. Bennet of Colorado, appointed on January 21, 2009.[13] Neither Florida nor Colorado held

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[10] See http://senate.gov/artandhistory/history/ common/ briefing/senators_appointed.htm.

[11] See http://senate.gov/pagelayout/senators/f_two_ sections_with_teasers/states.htm.

[12] See http://lemieux.senate.gov/public/?p=Home.

[13] See http://www.colorado.gov/governor (follow "Press Releases" to "View 2009 Press Releases Here" to January 3

a second, special election on November 2 to replace these appointees for the remaining weeks of 2010, as the Seventh Circuit's rule requires.

Among other current Senators, Robert Menendez of New Jersey (appointed in 2006) and Lisa Murkowski of Alaska (appointed in 2002) received appointments within two years of the natural end of the vacated Senate term, and neither State held two, side-by-side elections for the same seat on the next Congressional election day, as the decision below commands.[14] Rather, as in Colorado and Florida this year—and as Illinois would have done in the absence of the Seventh Circuit's ruling—voters in New Jersey and Alaska elected a Senator for the new, six-year term beginning the following January, when the vacated term expired.

In short, this case presents a recurring and significant constitutional question. The Seventh Circuit's unprecedented rule imposes substantial costs on voters and States alike, breaks dramatically from historical state practices, would invalidate the election laws of at least 13 States, and would overturn the way two States treated Senate vacancies in 2010 alone. Left undisturbed, the decision below creates an intractable uncertainty for the States, which must choose between

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and 21, 2009 Press Releases regarding Senate appointment).

[14] See http://menendez.senate.gov/biography; http://www.washingtonpost.com/wp-srv/elections/2004/candidates/22914; http://murkowski.senate.gov/public/index.cfm?p=Biography.

the need to avoid voter confusion, potential lack of representation in the House, and past practice, on the one hand, and a federal appellate court decision announcing a new rule of constitutional law, on the other.

III. The Decision Below Is Wrong On The Merits.

The Seventh Circuit's novel interpretation is not only incompatible with this Court's precedent, see *supra* Part I, but it also misreads the Seventeenth Amendment. The Amendment's proviso, which governs gubernatorial appointments, sets out an exception to the requirement that the Governor issue a writ of election for every vacancy. And even if the Amendment required such a writ as a general matter, a *de minimis* exception would apply where, as here, the vacated term expires in the normal course following the upcoming general election.

1. The Seventeenth Amendment makes clear that the Governor need not call a special election every time a vacancy occurs. To be sure, its second paragraph begins with the directive that, "[w]hen vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies." That is the Amendment's default rule for filling Senate vacancies, and it is nearly identical to the constitutional rule for filling House vacancies. See U.S. CONST., art. I, § 2, cl. 4. But later in the same sentence of the Seventeenth Amendment, the proviso, which has no analogue in Article I, Section 2, gives States an alternative, whereby "the legislature of any State may empower the executive

thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." See generally *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2190 (2009) (noting that a proviso may "except something from the enacting clause, or * * * qualify and restrain its generality" or may set out its own "general, independent rule") (internal quotation marks omitted).

This clause grants substantial power to state legislatures to respond to Senate vacancies. As *Valenti* recognized, the Amendment "allow[s] the states to conduct Senate vacancy elections in accordance with their regular election procedures, so long as those procedures further substantial state interests." 292 F. Supp. at 861. To be sure, the authority that the proviso confers is not unlimited; the Governor's appointment is only "temporary," and as *Valenti* recognized, use of this term necessarily limits the duration of a gubernatorial appointee's period of service. See *id.* at 856. But the Amendment clearly grants a state legislature (that is willing to give a temporary appointment power to the Governor) authority to "fill the vacancies by election as [that] legislature may direct." Nothing in this language prohibits the legislature from "direct[ing]"—in cases like this one, where the vacated Senate term expires following the next general election—that "the people fill the vacanc[y]" in that seat "by elect[ing]" a new Senator to begin the next full, six-year term starting the following January.[15] And at least 13 States require

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[15] In the alternative, even if the phrase "fill the vacancies by election" were understood to refer exclusively to elections

precisely that on the face of their election codes, allowing an appointed Senator to complete a vacated Senate term if that term expires following the next November election. See *supra* p. 17 & n.6.

This has been a common practice historically, as the decision below observed, with at least 27 instances in which States left the gubernatorial Senate appointee in place until the new Senate term began. App. 36a. These laws and practices not only give effect to the plain language of the proviso but, to the extent that the Amendment is susceptible to more than one reasonable construction, the States' time-honored practices properly inform the proviso's interpretation. See *Valenti*, 292 F. Supp. at 858; see also *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (finding evidence of law's meaning in "long and continuous interpretation in the course of official action under the law"); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 315 (1851) (laws existing in States since Constitution's adoption are "entitled to great weight, in determining whether such a law is repugnant to the Constitution"), overruled on other grounds by *Complete Auto Body Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

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to fill the seat during some portion of the original, vacated Senate term, the proviso authorizes the legislature to fill vacancies "by election as the legislature may direct," and surely this permits the legislature to "direct" that there be no such election where holding one would run contrary to the public interest.

2. Even if the Amendment required a special election for every Senate vacancy—but see *Rodriguez*, 457 U.S. at 11 ("the Seventeenth Amendment permits a state * * * to forgo a special election")—a *de minimis* exception would bar application of that general rule where the vacated term expires following the next general election. This Court has recognized consistently that constitutional protections, including voting rights, are not implicated when the infringement is *de minimis*. See, *e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 133-134 (1986) (plurality op.) ("more than a *de minimis* effect" on voting rights is required to implicate Equal Protection Clause); *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (same with regard to "one person, one vote" requirement of Article I, Section 2); see also *Hudson v. McMillan*, 503 U.S. 1, 9-10 (1992) (Eighth Amendment "necessarily excludes from constitutional recognition *de minimis* uses of physical force"); *Bell v. Wolfish*, 441 U.S. 520, 539 n.21 (1979) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.")

This reasoning is fully applicable here, as State regulation of elections inevitably imposes some burdens on voters and candidates, and rational, minimal impositions are not unconstitutional. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); see generally *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, *J.*) ("The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints."). And the need for some *de minimis* exception

to an otherwise rigid rule requiring the Governor to call a special election in the case of every Senate vacancy is beyond dispute. Imagine the vacancy that arises just weeks or days before the Senate term's expiration. It would be impossible in such a case to hold an organized election that conformed to the bare minimum federal and state election laws.

Indeed, the decision below itself acknowledges the likely need for some "*de minimis*" exception under the Seventeenth Amendment. App. 37a; see also *ACLU v. Taft*, 385 F.3d 641, 650 (6th Cir. 2004) (recognizing that "there may be situations where an executive's duty [to call a special House election under U.S. CONST. art. I, § 2, cl. 4] is excused because the time remaining on the Congressional term is truly *de minimis*"). Without analysis, however, the court of appeals here stated that it was "not prepared" to recognize the period between the certification of election results following the November 2 election and January 3 as *de minimis*.

But this period—between the general election and the swearing in of the new Congress—should be considered *de minimis* as a matter of law. These two months fall well short of the 29 months upheld in *Valenti*, or the more than three years without an election that this Court sustained as a "minimal" intrusion on voting rights in *Rodriguez*.

Nor is it truly a two-month period, for election authorities use the weeks following a general election to count absentee ballots, conduct recounts, and certify results, while parties questioning the accuracy or propriety of initial results use this time to mount legal

challenges. In Illinois, for example, under ideal conditions—without lawsuits or recounts—the Illinois State Board of Elections does not certify results from a November general election until early December. See 10 ILCS 5/18A-15(a), 19-8, 22-1, 22-5, 22-8, 22-9, 22-9.1 22-15 (2008). Indeed, even with a court order directing state election officials to "disregard" state law and seat Senator Kirk, who won the November 2 special election for the remainder of President Obama's Senate term, "as soon as possible," App. 62a-63a, he did not take office until November 29. And that was on the tightest of schedules. Recounts and legal challenges could have pushed that date later, reducing the Senate tenure of the winner of the special election from just over four weeks to mere days, if anything. Meanwhile, all of this presumes that the Senate will be in session in December, something that has been true only about 50% of the time between 1978 and 2009 (17 out of 32 sessions), and on those occasions when there have been such sessions, its average length has been little more than 11 days.[16]

Under the Seventh Circuit's new rule, voters in most States—which seek the "substantial * * * benefits" recognized in *Valenti* by waiting until the next Congressional election to fill a vacant Senate seat—will have to endure the risk of confusion and non-representation in exchange for this (at best) *de minimis* period of service, a period during which the State would

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[16] See http://thomas.loc.gov/home/ds/index.html#senate (192 total session days across 17 December hold-over sessions from 1978 to 2009).

have been represented by an appointee without incurring these costs. Under the Seventh Circuit's rule, the only alternative is to abandon the advantages that *Valenti* identified and hold freestanding, special elections, at significantly greater expense to taxpayers and likely substantially lower voter turnout. See 292 F. Supp. at 859-860.

IV. This Case Provides A Proper Vehicle For Resolving The Question Presented.

1. Not only is the question presented a critical and recurring one for States and voters nationwide, but this case provides an ideal vehicle for resolving it. The Seventh Circuit's published opinion thoroughly analyzes the issue. And significantly, respondents have abandoned any argument that the period between President Obama's Senate resignation and the election of his successor in November 2010 was unconstitutionally protracted (a claim that *Valenti* forecloses in any event). See App. 7a, 20a. As a result, the threshold question (a challenge to the length of service by the gubernatorial appointment) that can be expected to surface in most cases raising the question presented here, would not play any part in this appeal. Rather, the sole question that this case asks is the one that now demands a clear resolution—whether States must hold a special election every time a Senate vacancy arises, even where the vacated term expires following the next general election.

2. Nor is this question immunized from this Court's review under the mootness doctrine. Although the 2010 Illinois general election has passed, this case

"fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)); accord *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008). Not surprisingly, election cases routinely satisfy these criteria. See *Davis*, 128 S. Ct. at 2769-2700; *Wisc. Right to Life*, 551 U.S. at 462-464; *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); see also Eugene Gressman, *et al.*, SUPREME COURT PRACTICE 928-929 (9th ed. 2007) (citing *Democratic Party v. Wisconsin*, 450 U.S. 107, 115 n.13 (1981); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)). And this case is no exception.

First, petitioner's request for this Court's review of the decision below could not reasonably have been resolved before the 2010 election, demonstrating that the controversy is of a type that threatens to evade review. By the time the Seventh Circuit issued its opinion on June 16, 2010, and its order on rehearing on July 22, 2010, petitioner could not seek relief in this Court prior to the November 2 election without further jeopardizing the integrity of that election. If petitioner had applied for a stay from this Court in late July, after the Seventh Circuit denied rehearing, and this Court had stayed enforcement of the district court's order

while reviewing petitioner's certiorari petition, only to deny that petition and lift the stay in October, it would have left the State and its voters in an impossible position just weeks or days before the general election. As of late July, Illinois election authorities had less than two months to determine candidates and print and ready ballots for absentee and other military voters, see 10 ILCS 5/16-5.01(a) (2008); 42 U.S.C. § 1973ff-1(a)(8), and in-person Grace Period Voting and Early Voting began in Illinois on October 6 and October 11, 2010, respectively, see 10 ILCS 5/4-50, 5/5-50, 5/6-100, 5/19A-15 (West 2010). Even a short delay in preparations would have threatened the integrity of the November elections, and petitioner therefore had no choice but to prepare for the two Senate elections that the Seventh Circuit had ordered and challenge that court's constitutional error after November 2.

Second, there is a reasonable likelihood that this dispute will recur, showing that the question presented is capable of repetition. This second prong of the mootness exception "requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Wisc. Right to Life*, 551 U.S. at 463 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*)) (internal quotation marks omitted). Petitioner easily satisfies this requirement. As history has shown, Senate vacancies followed by gubernatorial appointments are common. See *supra* Part II. Indeed, in the November 2010 election alone, two States with vacancy appointees elected Senators to new, six-year

terms without the extra, special election that the Seventh Circuit now requires. See *ibid.*

3. Moreover, it is irrelevant that petitioner technically prevailed in the Seventh Circuit, insofar as that court affirmed the district court's order denying respondents preliminary injunctive relief. Only the party who "'receives all that he has sought'" from the lower court and thus "'is not aggrieved by the judgment affording the relief'" lacks standing to challenge that judgment on appeal. *Forney v. Apfel*, 524 U.S. 266, 271 (1998) (quoting *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)). But where, as here, a party receives "some, but not all, of the relief * * * requested," the party—although technically "'prevailing'"—"is 'aggrieved' and ordinarily can appeal." *Ibid.*; see also *United States v. Jose*, 519 U.S. 54, 56 (1996) (*per curiam*) (party may appeal decision "granting in part and denying in part the remedy requested"); *Roper*, 445 U.S. at 334 n.6 ("party who has prevailed on the merits" may appeal "so long as that party retains a stake" in the litigation).

Nor is petitioner seeking merely to correct adverse dicta below. Cf. *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, *J.*, dissenting from denial of certiorari) (Court disfavors petitions seeking solely "to correct errors in dicta"). On the contrary, the Seventh Circuit construed the Seventeenth Amendment to require petitioner "to issue a writ of election" that will "announce to voters that there will be, in effect, two elections on [November 2, 2010]—one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress," App. 34a, 37a, and the

court directed the State to "endeavor to certify the results of that election as soon as possible, so that the replacement senator may * * * take office promptly," App. at 62a-63a.[17] The Seventh Circuit denied preliminary relief only because there was "still time" for petitioner to issue the writ on his own, precluding respondents from showing irreparable injury absent a preliminary injunction. App. 39a-40a. The district court, however, like petitioner (who issued the writ without awaiting a separate order from the district court, see *supra* p. 10), understood the Seventh Circuit to have ordered petitioner to issue a writ of special election. Tr. of 6/23/10 Hearing at 33 (district court, on remand, construing panel decision to "hold[] that we must" issue a writ of election). There can be no question that the Seventh Circuit's decision imposed additional, tangible burdens on petitioner, and that this case presents an ideal vehicle for resolving the significant and recurring question presented.

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[17] That the Seventh Circuit understood its opinion to *mandate* particular relief is confirmed by the fact that the court construed petitioner's June 28, 2010 "Motion to Amend Opinion or, in the Alternative, Petition for Rehearing *En Banc*" as a request for rehearing or rehearing *en banc*, even though petitioner had not technically sought modification of the Seventh Circuit's judgment (as opposed to amendment of its opinion). App. 61a. Such a construction was permissible only because the Seventh Circuit understood the panel opinion to have ordered a special Senate election, with only the details of that election left for the district court to decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LISA MADIGAN
Attorney General
of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
BRETT E. LEGNER
Ass't Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

DECEMBER 2010

APPENDICES

APPENDIX A

In the

United States Court of Appeals
For the Seventh Circuit

No. 09-2219

GERALD A. JUDGE and DAVID KINDLER,

Plaintiffs-Appellants,

v.

PAT QUINN, Governor of the State of Illinois, and
ROLAND W. BURRIS, U.S. Senator,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 09 C 1231—**John F. Grady**, *Judge.*

ARGUED SEPTEMBER 17, 2009
DECIDED JUNE 16, 2010

Before ROVNER, WOOD, and TINDER, *Circuit Judges.*

WOOD, *Circuit Judge.* Constitutional specialists and U.S. history buffs will recall that the original Constitution of 1787 took a cautious approach toward the election of public officials. It interposed the Electoral College between the voters and the President, U.S. CONST. art. II, § 1, and it provided that each state's two senators would be chosen by the state legislature, U.S. CONST. art. I, § 3. "Judges of the supreme Court" were to be appointed by the President, "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2. Only the members of the House of Representatives were to be "chosen . . . by the People of the several States." U.S. CONST. art. I, § 2.

In 1913, the Seventeenth Amendment to the Constitution effected a fundamental change in the legislative branch of government by providing for the direct election of senators. The amendment also changed the rules for filling vacancies in a state's senatorial delegation. Under the original Constitution, the executive authority of the state could make a temporary appointment, which would last until the next meeting of the legislature. The Seventeenth Amendment modified that process, to reflect the fact that, in principle, senators were to be elected by the voters. The relevant language is as follows:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make

> temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. CONST. amend. XVII para. 2. That passage may look straightforward, but this appeal has demonstrated that there is more to it than meets the eye. We must decide whether the system that Illinois is using to fill a famous vacancy in one of its senate slots has strayed so far from the mark that a preliminary injunction should have been entered by the district court. We conclude that the district court did not abuse its discretion in refusing the requested injunction, and we therefore affirm its order.

I

A

Our case began after Barack Obama, then the junior senator from Illinois, won the presidential election on November 4, 2008. The next week, President-elect Obama wrote to Rod Blagojevich, then the governor of Illinois, announcing that the President-elect would resign his position in the U.S. Senate, effective November 16, 2008. Two years and 48 days remained in his six-year term at the time of his resignation. The President-elect's resignation created an immediate vacancy in one of Illinois's two senate seats. On December 31, 2008, then-Governor Blagojevich named Roland Burris, a former Attorney General of Illinois, to assume the Obama seat. A certificate of appointment signed by the governor said that the appointment was to last "until the vacancy . . . caused by the resignation of Barack Obama, is filled by election as provided by law."

Mr. Burris took the oath of office on the Senate floor on January 15, 2009.

In the meantime, the Illinois House of Representatives voted to impeach Governor Blagojevich; it returned a wide-ranging article of impeachment alleging that the governor had abused his powers, including his power to appoint a U.S. Senator. On January 29, 2009, the Illinois Senate convicted Governor Blagojevich and relieved him of duty. Lieutenant Governor Pat Quinn assumed the office of Governor of Illinois.

B

Upon Senator Burris's taking office, David Kindler and Gerald Judge, both registered voters in Illinois, sued Governor Quinn under 42 U.S.C. § 1983, alleging a violation of their rights guaranteed by the Seventeenth Amendment to the U.S. Constitution. The plaintiffs wanted the district court to declare the provisions in the Illinois Election Code for filling U.S. Senate vacancies unconstitutional and to issue an injunction requiring an election to select the person to complete the Obama term. In particular, they objected to the following part of the Illinois Election Code:

> When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

10 ILCS 5/25-8 (West 2010). According to this provision, the date for the election to fill the Obama vacancy is set for November 2, 2010. (Sixty-two days will elapse between that day and the start of the 112th Congress on January 3, 2011.) The plaintiffs argued that this provision of the Illinois Election Code contravenes the second paragraph of the Seventeenth Amendment by allowing Senator Burris to serve as an appointee for an unreasonably long period of time and by saying nothing about Governor Quinn's duty to issue a writ of election. Governor Quinn's continuing failure to issue a writ of election (and Governor Blagojevich's failure to do so before him), they asserted, violated the same constitutional command. The primary relief that the plaintiffs originally requested was an injunction requiring Governor Quinn to "issue a writ for a special election to be conducted as soon as practical to fill the vacancy."

Their motion for a preliminary injunction asked the court to "order[] the Governor to comply with the Seventeenth Amendment by issuing a writ setting an election to fill the vacancy in the Senate seat, not in November, 2010, but at the earliest practical date." Governor Quinn responded with a motion to dismiss, in which he argued that neither his actions nor the Illinois Election Code violated the federal Constitution. Senator Burris submitted a brief in opposition to the complaint as well, at which point the district court concluded that he was a party that had to be joined under Federal Rule of Civil Procedure 19. The plaintiffs obliged and added him as a defendant.

At that point, the plaintiffs replied to both defendants' motions to dismiss. In this filing, which the

district court construed as a reply brief for purposes of the motion for a preliminary injunction, the plaintiffs advanced a new argument: the Illinois statute violated the Seventeenth Amendment because it denied the Illinois governor discretion to *decline* to make a temporary appointment to a vacant senate seat and to opt instead for an immediate election. In addition, the plaintiffs clarified that they were asking for an injunction "requiring the Governor to issue a writ setting a date for a special election to fill the vacancy in the Obama seat." But the details of their request shifted substantially: instead of pressing for an election at the earliest practical time, they now argued that the election should occur "on a reasonable, but relatively early date," or at a minimum, that "the Governor must be ordered to exercise his discretion by acting to set *some* date for a special election." (Emphasis added.)

On April 16, 2009, the district court granted the defendants' motions to dismiss and denied the plaintiffs' request for a preliminary injunction. The court refused to consider the challenge to the Illinois Election Code that the plaintiffs had introduced in their reply brief. It did, however, dismiss the case without prejudice, allowing the plaintiffs time to amend their complaint to present that claim properly. The plaintiffs did so, but they also appealed the district court's denial of their request for a preliminary injunction. See 28 U.S.C. § 1292(a)(1).

II

Before turning to the central questions on appeal, we must clarify what exactly is before us. Two of the claims

that the plaintiffs have advanced are not. First is the argument that the plaintiffs raised for the first time in their reply brief, to the effect that the Illinois statute is unconstitutional because it requires the governor to make a temporary appointment when a senate vacancy arises, rather than "empowering" him to choose whether or not to make such an appointment. The district court was under no obligation to entertain this late submission, nor should we. *Spitz v. Tepfer*, 171 F.3d 443, 448 (7th Cir. 1999). Second is the initial contention that Governor Quinn is under an obligation to order an election to fill the vacancy that will take place as soon as possible. The plaintiffs' briefs disavow any argument relating to the timing of the election that they seek, and when we pressed them at oral argument, they explicitly abandoned this position.

More puzzling is whether we may consider the argument that the plaintiffs do make before this court. The plaintiffs take the position that Governor Quinn must issue a writ of election fixing *some* date for an election to fill Illinois's vacant senate seat, but they do not name a date on which that election should take place. Both sides agree that a writ of election must include a date on which the election in question will occur. But the defendants argue that the plaintiffs have waived the argument that a writ must issue regardless of the election date that it incorporates because the plaintiffs did not develop the argument sufficiently before the district court. *E.g.*, *Kunz v. DeFelice*, 538 F.3d 667, 681 (7th Cir. 2008).

In this instance, we conclude that the defendants are being too picky. The district court decided that the procedure prescribed by the Illinois Election Code was

all that the Seventeenth Amendment required. It found that Illinois law calls for an election to fill the vacancy at the same time as the November 2, 2010, general election; Governor Blagojevich appointed Senator Burris to serve until an election took place, as provided by Illinois law; and the total duration of the vacancy—roughly two years, measured from Senator Obama's resignation until the November 2010 general election—was not unreasonable in light of *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), summarily aff'd, 393 U.S. 405 (1969) (*per curiam*). The district court concluded that because the plaintiffs could not show that the procedures set out in the Illinois statute violated their constitutional rights, they were not entitled to an injunction requiring Governor Quinn to issue a writ of election calling for a special election to take place prior to November 2010. The court found it unnecessary to decide whether the Seventeenth Amendment requires the governor to issue a writ of election, even if it names November 2, 2010, as the designated date.

We are satisfied that the plaintiffs have preserved their right to argue that a writ of election is constitutionally required. They presented this position both to the district court and in this court. Their argument that Governor Quinn must issue a writ calling for an election to fill the senate vacancy on a date as soon as possible encompasses the claim that the governor must issue a writ of election. As they have asserted since the opening line of their first complaint in the district court, "This is an action . . . seeking to redress the ongoing violation of the Seventeenth Amendment . . . by the failure of defendant, as Governor of Illinois, to issue a writ for a special election to fill a vacancy in the United States

Senate." Accordingly, we may consider whether the plaintiffs are entitled to a preliminary injunction ordering Governor Quinn to issue a writ of election calling for an election specifically to fill out the remainder of President Obama's term in the 111th Congress (rather than an election to choose the junior senator from Illinois for the 112th Congress).[1]

III

One more preliminary matter must be addressed before we turn to the main event: the defendants argue that the plaintiffs lack standing to pursue the injunctive relief that they seek. This is the case, the defendants say, because the only injury that the plaintiffs allege is the inability to hold the Illinois governor, rather than the state legislature, accountable for setting the date of the election for the vacancy. The defendants assert that this injury is not sufficiently concrete or specific to the plaintiffs to invoke the jurisdiction of the federal courts.

Article III of the Constitution limits federal judicial power to the resolution of cases and controversies. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 597-98 (2007). Standing rules implement this limitation.

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[1] Any senator who completes his or her full six-year term will serve in three Congresses. When Senator Obama first took office on January 3, 2005, he joined the 109th Congress; at the time he resigned in November 2008, the 110th Congress was in its final days; the 111th Congress began on January 3, 2009, and will end on January 3, 2011. Any claim concerning the seven-week Obama vacancy in the 110th Congress is now moot.

Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11-12 (2004). A plaintiff satisfies constitutional standing requirements by showing that the challenged action of the defendant caused an "injury in fact" that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992). The alleged injury must be concrete and particularized, and either actual or imminent. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

The plaintiffs allege that Governor Quinn's failure to issue a writ of election will injure them because without a writ of election, an election to fill the senate vacancy left by President Obama will never take place—not on November 2, 2010, or any other date. The plaintiffs argue that, if things remain as they are now, Senator Burris will serve until the next Congress begins on January 3, 2011, at which time an entirely new term for one of Illinois's senators will begin. The State of Illinois appears to agree that this will be the practical effect of the state's system. In an opinion letter to leaders in the Illinois legislature, Illinois Attorney General Lisa Madigan wrote: "Under the current language of [10 ILCS 5/25-8], U.S. Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election of representatives in Congress." Senatorial Vacancy under the Seventeenth Amendment, 2009 Op. Ill. Att'y Gen. No. 09-001, 2009 WL 530827 (Ill. A.G. Feb. 25, 2009). In addition, the Illinois State Board of Elections's current list of offices that will appear on the November 2, 2010, ballot in Illinois does not specify that there will be an election on that date to fill the balance of President Obama's senate term. See State of Illinois Candidate's Guide 2010, at i, available at http://

www.elections.state.il.us/Downloads/ElectionInformation/PDF/2010Canguide.pdf (last visited June 15, 2010). This evidence suggests that without a writ of election calling for an election to fill the Obama vacancy, the plaintiffs will not have an opportunity to elect a replacement senator.

It is clear enough that the plaintiffs' alleged injury is traceable to Governor Quinn's conduct and would be redressed by a favorable decision. The district court, for example, could prevent the injury by granting an injunction requiring Governor Quinn to issue a writ of election to supply a replacement senator for the fast-waning Obama term, rather than for the new Congress. The more substantial issue is whether the plaintiffs have identified an "injury in fact" that is sufficient for purposes of standing.

The essence of the plaintiffs' claim is their attempt to vindicate their right to vote for the replacement senator, rather than have someone appointed by either an executive or legislative actor. This is precisely what the Seventeenth Amendment is all about. The first paragraph says that the Senate "shall be composed of two Senators from each State, elected by the people thereof" and fixes the qualifications for electors participating in senatorial elections. U.S. CONST. amend. XVII para. 1. The second paragraph implements the general principle of the first for any vacancies that may arise. Initially, it seems to call exclusively for elections to fill vacancies, where it says that "the executive authority of [the] State shall issue writs of election to fill such vacancies." But then it adds a proviso permitting "temporary" appointments by the executive "until the people fill the vacancies by election

as the legislature may direct." U.S. CONST. amend. XVII para. 2. The plaintiffs here believe that Illinois has exceeded whatever authority it may have under the proviso.

The Supreme Court has recognized that plaintiffs have standing to sue when they allege that state election procedures violate their right to vote under the Seventeenth Amendment. In *Gray v. Sanders*, which involved such a challenge to Georgia's primary-election laws, the Court emphasized the long-standing rule that "any person whose right to vote is impaired . . . has standing to sue." 372 U.S. 368, 375 & n.7 (1963) (citing *Baker v. Carr*, 369 U.S. 186, 204-08 (1962); *Smith v. Allwright*, 321 U.S. 649 (1944); *Ashby v. White*, (1703) 2 Ld. Raym. 938, 953-56 (K.B.)). In addition, *Valenti v. Rockefeller*, *supra*, a case summarily affirmed by the Supreme Court, concluded that "plaintiffs alleging that their right to vote to fill a Senate vacancy will be curtailed[] have sufficient standing to maintain this action." 292 F. Supp. at 853 n.1.

It is instructive to compare the procedures adopted in the Seventeenth Amendment to those in the original Constitution for filling vacancies in the House of Representatives. Article I, Section 2 says: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. art. I, § 2, cl. 4. In *Jackson v. Ogilvie*, Illinois voters alleged that the governor had to issue a writ of election calling for an election to fill a vacant seat in the House, and this court upheld their standing to sue for a deprivation of their right to elected representation. 426 F.2d 1333, 1335 (7th Cir. 1970). We see no reason to treat the current

plaintiffs' alleged injury differently. They assert that the governor's failure to issue a writ of election will deny them their right to vote under the Seventeenth Amendment, and their lawsuit represents an effort to prevent interference with that right. This is enough to establish that plaintiffs have been injured in fact and that they have a concrete stake in the outcome of the litigation. See, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000).

This case does not present a "generalized grievance" so widely shared that the political process provides a more appropriate remedy for the plaintiffs. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23-25 (1998); *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). A voting rights claim strikes at the heart of the political process. Where a plaintiff's voting rights are curtailed, the injury is sufficiently concrete to count as an "injury in fact." See, *e.g.*, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999); *Akins*, 524 U.S. at 23-25; *Baker*, 369 U.S. at 207-08. In this case, the plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' . . . not merely a claim of 'the right possessed by every citizen to require that the government be administered according to law.'" *Baker*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939), and *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922), respectively) (internal quotation marks omitted). Bearing in mind that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), we conclude that the plaintiffs have alleged a concrete and specific injury that is neither conjectural

nor hypothetical, and thus they may proceed with their action.

IV

We turn at last to the merits of the interlocutory appeal from the denial of injunctive relief. To justify a preliminary injunction, the plaintiffs must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm without the injunction, that the harm they would suffer is greater than the harm that the preliminary injunction would inflict on the defendants, and that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007). These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). In this case, as in many, the primary reason why the court denied preliminary relief was its assessment of the plaintiffs' likelihood of success on the merits. Accordingly, we begin our discussion there, before turning to the other considerations.

As we noted earlier, the only question properly before us is whether the plaintiffs' assertion that Illinois's governor, by command of the Seventeenth Amendment, must issue a writ setting an election to fill the Obama vacancy is well taken. Implicit in this inquiry is a practical consideration: must Illinois law

somehow assure that the date of such an election is set so that the vacancy is filled some time before the commencement of the 112th Congress? In order to answer this question, we turn to the language of the Seventeenth Amendment, to decide whose reading—the plaintiffs' or the state's—is better founded.

A

Although we have already quoted the second paragraph of the Seventeenth Amendment in full, we set it out again here, identifying this time each of the critical phrases:

> [1] When vacancies happen in the representation of any State in the Senate, [2] the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, [3] That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election [4] as the legislature may direct.

U.S. CONST. amend. XVII para. 2. The first two phrases appear in what we will call "the principal clause," and the last two in what we will call "the proviso." In interpreting this text, we have taken care not to lose sight of the fact that the provisions for filling vacancies immediately follow the amendment's central command that henceforth the two senators from each state must be chosen by popular election.

1. The Principal Clause.

The first part of the principal clause states a condition: a vacancy must "happen" in "the representation of any State in the Senate." We need not tarry here, as there is no question that the President-elect's resignation on November 16, 2008, caused a vacancy to "happen."

The second part of the principal clause does two jobs: it delegates responsibility for addressing the vacancy to "the executive authority" of the affected state, and it tells the executive what to do—that is, to issue a writ of election and thereby assure that the replacement senator will, like the original one, be popularly elected. This clause uses the word "shall," which is normally understood as mandatory language. See, *e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); but see BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939-41 (2d ed. 1995) (discussing "words of authority" and arguing that "shall" is inherently ambiguous).

Reading the second part of the principal clause to impose a mandatory obligation on the state executive has the virtue of ensuring consistency between this provision and the counterpart language addressing vacancies in the House of Representatives. In this respect, the text of the Seventeenth Amendment is functionally identical to Article I, Section 2 of the Constitution, which governs elections to fill vacant seats in the House of Representatives. Compare U.S. CONST. amend. XVII, with U.S. CONST. art. I, § 2, cl. 4. The drafting history of the Seventeenth Amendment reveals

that this was no accident. Senator Joseph Bristow, who proposed the language that was approved by the 62nd Congress and ratified by the states as the Seventeenth Amendment, identified this similarity when he explained his proposed amendment to the Senate. 47 CONG. REC. 1482-83 (May 23, 1911). (Senator Bristow's comments are the only substantive discussion of the text of the Seventeenth Amendment's vacancy-filling provision in the legislative history of the amendment's passage in Congress.) In *Jackson v. Ogilvie*, *supra*, this court concluded that the language of the House vacancy-filling provision in Article I, Section 2 was "mandatory according to the ordinary meaning of its terms. . . . [I]t renders the issuing of the writs an indispensable duty." 426 F.2d at 1336 (internal citation and quotation marks omitted). Both Article I, Section 2 and part 2 of the Seventeenth Amendment's principal clause command the responsible state official to call an election in which the people can select a replacement senator or representative, should a vacancy arise. We read this language as a mandatory requirement in *Jackson v. Ogilvie*, and we see no reason to take a different approach here for purposes of the Seventeenth Amendment.

2. The Proviso.

If the Seventeenth Amendment ended with the principal clause, our task would be over. But it did not. Instead, it added a proviso that permits temporary appointments to the Senate for the period before an election takes place. As the district court observed, the vacancy-filling provision in Article I, Section 2 "does not contain anything comparable to the Seventeenth Amendment's proviso." The House vacancy provision

begins and ends with the imposition of a mandatory duty to call an election for the vacancy. We must therefore consider how the proviso interacts with the principal clause, and then look at the specific system that Illinois has adopted to fulfill its responsibilities.

a. Temporary Appointment Power. It should come as no surprise that the drafters of the Seventeenth Amendment contemplated a role for temporary appointments when senate seats were left unoccupied. A similar provision addressing vacancies in the Senate appears in the unamended Constitution. As originally ratified, the Constitution provided, "[I]f Vacancies happen [in the Senate] by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." U.S. CONST. art. I, § 3, cl. 2. There was some concern during the 1787 Convention and at one state's ratifying convention that this executive appointment power was unwise and unnecessary. See 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 395 (J. Elliot ed., 1845) [hereinafter ELLIOT'S DEBATES] (remarks of James Wilson); 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (J. Elliot ed., 2d ed. 1836) (declaration of New York upon the ratification of the Constitution). Proponents of executive appointment power prevailed, however, by arguing that appointments were "necessary, in order to prevent inconvenient chasms in the Senate," which would occur because state legislatures met infrequently. Such "chasms," they urged, might become problematic if they were to last too long, considering the great power of the Senate. 5

ELLIOT'S DEBATES 395 (remarks of Edmund Randolph). Moreover, the extra authority to ensure that vacancies in the Senate were filled promptly reflected the Constitution's broader concern that the states maintain equal representation in the Senate. *E.g.*, U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

The language of the Seventeenth Amendment's proviso follows the same pattern as the original executive appointment provision that the Framers placed in Article I, Section 3. Comparing the language of these two provisions in 1911, Senator Bristow concluded that the proviso "is practically the same provision which now exists in the case of such a vacancy." 47 CONG. REC. 1483 (May 23, 1911). The identity of language in the two provisions supports the idea that the drafters of the Seventeenth Amendment intended to preserve, through the executive appointment power, the states' ability to maintain their representation in the Senate until the group charged with selecting a permanent replacement could exercise its constitutional role. Under both the original and the amended Constitution, the group charged with selecting a permanent replacement—whether the state legislature or the people—was the same one charged with selecting senators in the first place.

b. Contours of the Appointment Power. As we explained earlier, we need not, and do not, address several issues here that the plaintiffs either have not raised or have forfeited. We flag them now only for the purpose of clarifying what is included, and what excluded, from our present ruling. First, we have no occasion to say anything about the proviso's directive

that the state legislature may "empower" the executive to make temporary appointments. This capacity to "empower" raises questions about the role of the state legislature compared to that of the state executive in the appointment process.

In addition, we do not have before us any properly presented question about how long a temporary appointment may last under the Seventeenth Amendment, nor the closely related question how much time can elapse between the start of a vacancy and an election to fill it. On the latter point, the parties have discussed the three-judge district court opinion in *Valenti v. Rockefeller*, *supra*, which considered whether a 29-month wait for an election to fill the vacancy left by the assassination of Senator Robert F. Kennedy violated the terms of the Seventeenth Amendment. 292 F. Supp. 851. That court decided that the lapse in time did not offend the Seventeenth Amendment, and the Supreme Court summarily affirmed. When all is said and done, this leaves us without firm guidance from the Supreme Court.[2] See *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("[T]he precedential effect of a

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[2] The plaintiffs suggest that *Valenti* has no precedential force whatever because the Supreme Court summarily affirmed the district court's decision on grounds that the case was moot. We need not address this point, given our resolution of this case. They may, however, be overreaching, considering the fact that the Court itself has discussed aspects of *Valenti* in dicta. See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10-11 (1982); see also *Lynch v. Illinois State Bd. of Elections*, 682 F.2d 93, 96-97 (7th Cir. 1982).

summary affirmance extends no further than the precise issues presented and necessarily decided by those actions.") (internal quotation marks omitted).

As we noted, the plaintiffs have dropped their argument that Governor Quinn must issue a writ fixing the soonest possible date for a special election. They have pressed only the more modest claim that he has a duty to issue a writ of election that fixes a particular date for the election to fill the vacancy. *Valenti* had nothing to say about that issue. Indeed, *Valenti* could not have decided that question, because before the three-judge district court issued its opinion in the case, Governor Nelson Rockefeller made an appointment to Senator Kennedy's vacant seat and issued "a writ of election . . . for the November 1970 election to fill the vacancy for the remainder of the unexpired term (December 1, 1970, to January 3, 1971)." Motion on Behalf of Appellee to Dismiss or Affirm at 4, *Backer v. Rockefeller*, 393 U.S. 404 (1969) (No. 852) (companion case to *Valenti v. Rockefeller*, 393 U.S. 405 (1969) (No. 773)).

c. "As the legislature may direct." The proviso presents one final interpretive issue. The second paragraph, in Part 4 as we have numbered it above, ends with the phrase "as the legislature may direct." We must decide which part of the amendment is modified by that phrase: the entire second paragraph, the entire proviso, or just the immediate antecedent of that final phrase.

It is relatively easy to dismiss the first of those possibilities. The grammatical acrobatics that would be necessary to read "as the legislature may direct" to

modify the words "shall issue writs of election" are difficult to imagine. This would entail a conclusion that the phrase "as the legislature may direct" modifies everything in the entire paragraph—the power to issue writs of election, the power to make temporary appointments, and the power to schedule elections to fill vacancies. There is certainly nothing in the amendment that would warrant a restriction to one or more of those. The principal clause of the amendment designates the executive authority as the authorized actor, and the writ of election as the appropriate means for filling a vacancy. There is not a word about the state legislature, even though the Congress that drafted the amendment was consciously changing the system from one that was in the hands of the legislature to a new one. We do not believe that the same Congress would have re-introduced the state legislature through such a back-door mechanism.

The plaintiffs suggest two readings, but both of their interpretations also create problems. The first one involves treating the final phrase as something that addresses the entire proviso—in particular, as authorization for the state legislature to regulate directly the duration of the executive's temporary appointment. But this approach creates a redundancy. It would require reading the proviso as saying "the legislature of any State may empower the executive thereof to make temporary appointments as the legislature may direct." Second, and somewhat closer to the mark, the plaintiffs suggest that the phrase modifies only the word "election" that immediately precedes it, but that somehow the timing of the election is excluded from the legislature's power. That would be interesting

if there were some textual support for it, but there is none. We decline to read a limitation into the Seventeenth Amendment that is not there.

We conclude, therefore, that the phrase "as the legislature may direct" is best read as a straightforward modification of the directly preceding term "election." Any other construction upsets normal rules of English grammar, including the "'rule of the last antecedent,' according to which a limiting clause or phrase (here, ['as the legislature may direct']) should ordinarily be read as modifying only the noun or phrase that it immediately follows (here, ['election'])." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (our modifications). Accordingly, in addition to establishing the rule that state legislatures may "empower" state executives to make temporary appointments when vacancies arise, the proviso gives the state legislature the power to direct the "election" in which "the people fill the vacanc[y]." We note, before moving on, that the power of state legislatures to regulate elections to fill vacancies in the Senate is not established by the second paragraph of the Seventeenth Amendment alone. To the contrary, the Elections Clause in Article I, Section 4 of the Constitution instructs the states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's power to override those regulations. U.S. CONST. art. I, § 4, cl. 1. We return below to the importance of the Elections Clause to our understanding of the Seventeenth Amendment's vacancy-filling provision.

3. The Proviso's Relationship with the Principal Clause.

Next, we must consider how the authorization in the proviso for temporary, executive appointments to the Senate interacts with the principal clause's language indicating that the executive's job is simply to issue writs of election enabling the people to fill senate vacancies. The first issue is whether the proviso is better read as an alternative to the mandate set out in the principal clause, or as an elaboration on the process described in that clause. If it offers an alternative, then there is no doubt that the Illinois General Assembly has exercised its authority in this respect. If it is an elaboration, then we must decide how to reconcile the fact that the proviso authorizes the state legislature to "direct" the details of the election for the vacancy, while the principal clause requires the executive to issue a writ of election, which is a document that normally would specify the date on which the election in question will take place.

a. Alternative or Elaboration? The defendants would like us to rule that the principal clause and proviso are "two distinct paths to fill a Senate vacancy." They take the position that when a state legislature (exercising its power under the proviso) empowers the governor to make a temporary appointment and provides for an election, the legislature supplants any role that the executive, the principal clause, or the writ of election might have played. The plaintiffs, on the other hand, argue that the proviso has no bearing on the duty mandated by the principal clause. They view the proviso as a supplemental procedure that does nothing

more than permit the state legislature to empower the governor to make a temporary appointment until a vacancy election occurs.

While courts have long recognized that "[t]he general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality," *United States v. Morrow*, 266 U.S. 531, 534 (1925), "its general (and perhaps appropriate) office is not, alas, its exclusive use," *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2190 (2009). In some situations, a proviso will "'state a general, independent rule.'" *Id.* (quoting *Alaska v. United States*, 545 U.S. 75, 106 (2005)). To identify how the proviso in the Seventeenth Amendment functions, it is best to begin by reading the second paragraph as a whole, giving the language "such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law." *American Airlines, Inc. v. Civil Aeronautics Bd.*, 178 F.2d 903, 906-07 (7th Cir. 1949) (quoting *White v. United States*, 191 U.S. 545, 551 (1903)).

The most natural reading of the second paragraph, in our view, leads to the conclusion that the proviso qualifies the principal clause; it does not provide a free-standing alternative. The drafting and ratification history of the amendment supports this interpretation. See, *e.g.*, 47 CONG. REC. 1483 (May 23, 1911) (Senator Bristow, during the debates in Congress over the Seventeenth Amendment, remarked, "My amendment provides [in the proviso] that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, *and* he is directed by

this amendment [in the principal clause] to 'issue writs of election to fill such vacancies.'") (emphasis added); 2 JOHN BOUVIER, A LAW DICTIONARY 483 (15th ed. 1891) ("A proviso differs from an exception . . . . An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*."). The principal clause describes a chain of events: when a vacancy happens, the state executive issues a writ of election, which calls for an election in which the people will fill the vacancy. The proviso qualifies this chain of events by permitting an appointee to intercede temporarily between the start of the vacancy and the election that permanently fills that vacancy.

b. Reconciling the Proviso and the Principal Clause. Once we understand the proviso as a qualification of, rather than an alternative to, the principal clause, we must consider how the command that the state executive "shall issue writs of election to fill . . . vacancies" in the principal clause coexists with the proviso's authorization for vacancy elections to take place "as the legislature may direct." By its reference to the writ of election, the principal clause invokes a well-established mechanism for ensuring that elections take place. The proviso's statement that the "legislature may direct" vacancy elections calls to mind the role of the state legislatures under the Elections Clause of the Constitution. Once these background principles are understood, the two clauses of the Seventeenth Amendment's vacancy-filling provision are easily reconciled.

i. *The Principal Clause and Writs of Election*. While the writ of election is less famous than the other writ mentioned in the Constitution, U.S. CONST. art. I, § 9, cl. 2 (the "Writ of Habeas Corpus"), it too has a well-established role. The writ of election had long been a predicate to English parliamentary elections. See, *e.g.*, 2 THE CORRESPONDENCE OF HENRY HYDE, EARL OF CLARENDON 226 n.* (Samuel Weller Singer ed., 1828) (quoting 3 F. A. J. MAZURE, HISTOIRE DE LA RÉVOLUTION DE 1688, EN ANGLETERRE 264-65 (1825)) (explaining that King James II attempted to prevent parliamentary elections during the Glorious Revolution by withholding the writ). As the power of the monarch subsided over time, issuance of the writ of election became an increasingly ministerial duty. Still, even today, the writ triggers elections in Britain. See Representation of the People Act, 1983, c. 2, § 23 & sched. 1, pt. 1, § 1.

The role of the writ of election is also apparent in the history of American elections. From the start, the U.S. Constitution has included the requirement that state executives "issue Writs of Election" whenever there is a vacancy in the House. U.S. CONST. art. I, § 2, cl. 4. The Framers naturally would have viewed the writ as the proper device for initiating an election because the state constitutions referred to writs of election as the exclusive mechanism for filling vacant elected offices. See, *e.g.*, ILL. CONST. of 1818, art. II, § 11; see also DEL. CONST. of 1776, art. 5; GA. CONST. of 1777, art. VII; N.C. CONST. of 1776, art. X; The Northwest Ordinance para. 10, July 13, 1787, 1 Stat. 51 (1789). At the time that the states ratified the Seventeenth Amendment, many states' laws required state executives to issue writs of election to fill vacancies in elected offices. In

Illinois, for example, writs of election were required to call vacancy elections for every county and statewide office, as well as the office of U.S. Representative. See ILL. CONST. of 1870, art. IV, § 2; An Act in Regard to Elections, and to Provide for Filling Vacancies in Elective Offices, 1871-72 Ill. Laws, at 400-01, §§ 127-133. Today, the writ of election retains its essential place in state election procedure. See 10 ILCS 5/2A-4 (West 2010); 10 ILCS 5/2A-9(a-5) (West 2010); 10 ILCS 5/25-4 (West 2010); 10 ILCS 5/25-7 (West 2010); see also, *e.g.*, FLA. STAT. ANN. § 100.161 (West 2008); R.I. GEN. LAWS § 17-4-9 (2003); WASH. REV. CODE ANN. § 29A.28.041(2) (West Supp. 2010).

Importantly, at the time that the Seventeenth Amendment was drafted, it was settled that the state executive's power to issue a writ of election carried with it the power to establish the time for holding an election, but only if the time had not already been fixed by law. See GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 166 (2d ed. 1880); Case XXIII, John Hoge of Pennsylvania, Committee of Elections, 8th Cong. (1804), reprinted in CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, at 135 (M. St. Clair Clarke & David A. Hall eds., 1834). Even when the time of a vacancy election is fixed by law, however, the writ plays the important administrative role of authorizing state officials to provide for the myriad details necessary for holding an election (printing ballots, locating voting places, securing election personnel, and so on).

ii. *The Proviso and the Elections Clause.* The notion that state legislatures play an essential role in

promulgating the law that governs congressional elections also has deep roots. There is now a body of federal law that concerns congressional elections, *e.g.*, 2 U.S.C. §§ 1-9, but the states continue to control many aspects of federal elections. This is consistent with the proviso in the Seventeenth Amendment. The phrase "as the legislature may direct" affirms that the amendment was not intended to change the Elections Clause of the original Constitution, U.S. CONST. art. I, § 4, cl. 1; after all, the Seventeenth Amendment, as a later enactment, might have modified it. Under the Elections Clause, the states have "'broad power' to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)), limited only by Congress's power to "make or alter such Regulations," U.S. CONST. art. I, § 4, cl. 1; *Buckley v. Valeo*, 424 U.S. 1, 131-32 & n.174 (1976). But the Elections Clause does not just empower; it "expressly requires action by the States" when it comes to regulations for congressional elections. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995); accord *id.* at 862-63 (Thomas, J., dissenting).

The balance between the states' power and that of Congress to regulate congressional elections was a substantial issue when the Constitution was being drafted, see 5 ELLIOT'S DEBATES 401-02; THE FEDERALIST No. 59 (Hamilton), and it remained a contentious topic more than a century later as the Seventeenth Amendment worked its way through Congress. In fact, with the exception of the principal question whether the people should directly elect senators, no issue was more hotly debated than whether

the states should control senatorial elections exclusively or Congress should retain a role.[3] In all of the

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[3] In both the 61st Congress, where the Senate narrowly defeated a proposed amendment, and the 62nd Congress, which ultimately passed the amendment, the debate over federal control of senatorial elections commanded significant attention. See, *e.g.*, 46 CONG. REC. 847-48 (Jan. 13, 1911) (Sen. Sutherland); *id.* at 1161-69 (Jan. 20, 1911); *id.* at 1335-39 (Jan. 24, 1911) (Sen. Depew); *id.* at 2426-27 (Feb. 13, 1911) (Sen. Curtis); *id.* at 2491-98 (Feb. 14, 1911) (Sens. Bourne and Brown); *id.* at 2645-57 (Feb. 16, 1911)(debate between Sens. Sutherland and Borah); *id.* at 2756-63 (Feb. 17, 1911) (Sen. Rayner); *id.* at 3307 (Feb. 24, 1911) (Senate approves amendment retaining federal oversight of senatorial elections); 47 CONG. REC. 203-43 (Apr. 13, 1911) (House debate on proposed amendment); *id.* at 1482-90 (May 23, 1911) (Senate debate on Sen. Bristow's proposal); *id.* at 1879-1925 (June 12, 1911) (Senate debate on proposed amendment); *id.* at 1884-1924 (June 12, 1911) (Sen. Bacon's opposition to federal control); 48 CONG. REC. 6347-69 (May 13, 1912) (passage of proposed amendment through Congress). See generally JOSEPH L. BRISTOW, RESOLUTION FOR THE DIRECT ELECTION OF SENATORS, S. DOC. NO. 62-666, at 7-8 (1912); 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 106-115 (1938); 1 ROBERT C. BYRD, THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE, S. DOC. NO. 100-20, at 389-406 (1988). The question of federal control over senatorial elections left the Senate evenly divided, and it took the vote of Vice President James Sherman to decide the question in favor of retaining a role for federal oversight. See 47 CONG. REC. 1923 (June 12, 1911). The issue kept the proposed amendment tied up in a Conference Committee of the House and Senate for nearly a year. *Senators by Direct Vote Passes House*, N.Y. TIMES, May 14, 1912, at 1.

legislative history related to the passage of the Seventeenth Amendment, however, no member of Congress ever expressed doubt that state legislatures were the central actors when it came to passing laws that governed the election of senators.

The plaintiffs are correct that neither the proviso of the Seventeenth Amendment nor the Elections Clause overrides the duty of the state's executive to issue a writ of election when a vacancy occurs. It does not necessarily follow, however, that the executive's power to issue a writ of election includes the power to select any election date whatsoever. What is clear is that traditional writs of election always include a date. At the same time, the state legislature may pass laws that establish a range of dates from which the state executive may choose, and might even limit that set to a single day. In this way, the state executive's duty to issue a writ of election that includes a date for the election is constrained by, but not replaced by, the state legislature's obligation to direct elections to fill vacancies.

A recent example from Illinois illustrates this division of power. When Representative Rahm Emanuel resigned his seat in the House of Representatives on January 2, 2009, to become President Obama's Chief of Staff, he left a vacancy. Governor Blagojevich then issued a writ of election commanding the clerk of the county encompassing the affected congressional district "to cause a SPECIAL ELECTION to fill such vacancy . . . on TUESDAY, April 7, 2009." The Illinois law that governs vacancies in the House provides a range of dates within which a vacancy election must occur, and

Governor Blagojevich's writ of election incorporated a date within that range. See 10 ILCS 5/25-7 (requiring the Illinois governor, under these circumstances, to choose a day "within 115 days"). This reflects a common pattern. See, *e.g.*, MASS. ANN. LAWS ch. 54, § 140(a) (LexisNexis Supp. 2010) (effective Dec. 23, 2009) (requiring the governor, in some circumstances, to issue precepts fixing a date for a vacancy election between 145 and 160 days after the vacancy occurs); WASH. REV. CODE ANN. § 29A.28.041(2) (giving the executive discretion, in some circumstances, to pick any date for the vacancy election more than 90 days later than the date that the writ issues).

Read as a whole, therefore, the second paragraph of the Seventeenth Amendment sets up a system under which the principal clause and proviso assign complementary roles to the state's executive and legislative authorities in the process of filling senate vacancies. Nothing about the state legislature's power to direct the election to fill a vacancy qualifies or nullifies the executive's duty to issue writs of election.

4. Filling Vacancies under the Seventeenth Amendment.

To summarize, the vacancy-filling provision in the second paragraph of the Seventeenth Amendment imposes two requirements. First, every time that a vacancy happens in the state's senate delegation, the state must hold an election in which the people elect a permanent replacement to fill the vacant seat. Second, the executive officer of the state must issue a writ of election that includes a date for such an election to take

place. Whether the vacancy is first filled by a temporary appointee, as permitted by the proviso, is a matter left up to the state and is governed by state law. The temporary appointment ends when the people fill the vacancy in an election.

State law controls the timing and other procedural aspects of vacancy elections. The Elections Clause obliges the states to make these rules, and the final phrase of the Seventeenth Amendment's second paragraph reaffirms this role. The state legislature's power to make laws governing vacancy elections is limited by Congress's power under the Elections Clause to "make or alter" such regulations. To the extent that the plaintiffs argue that the governor must be able to select a date for the vacancy election of his own choosing, they are incorrect. The amendment does not disturb the power of the state legislature to confine the governor's discretion in selecting a date.

If the state legislature has exercised that power, then the state executive must name a date consistent with the state's law in the writ of election. In such a circumstance, the writ still has a critical role: it announces to the voters the time and place of the election; it sees that the electoral machinery is engaged; and it guarantees that an election for the vacancy will actually take place on the date directed. Where state law leaves room for executive discretion (as was the case when Representative Emanuel resigned), the executive may select a date within the authorized range. As a result, the defendants' position that the duty of setting a date for the vacancy election is entirely the prerogative of the state legislature is somewhat

misleading. If the state legislature leaves a measure of discretion over the timing of a vacancy election to the state executive, the state executive may exercise that discretion.

So understood, the second paragraph of the Seventeenth Amendment establishes a rule for all circumstances: it imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs. This demarcation of constitutional powers and duties between state executives and state legislatures advances the Seventeenth Amendment's primary objective of guaranteeing that senators are selected by the people of the states in popular elections.

B

This rather extended look at the underlying merits of the plaintiffs' claim has been necessary in order to evaluate their likelihood of success, as it bears on the district court's decision not to grant a preliminary injunction. As the case now stands, the plaintiffs take the position that the Seventeenth Amendment requires Governor Quinn to issue a writ of election calling an election to fill President Obama's vacancy in the Senate, and the state is arguing that he is under no such obligation. Our analysis of the Seventeenth Amendment convinces us that the plaintiffs have shown a strong likelihood of success on the merits. The governor has a duty to issue a writ of election to fill the Obama vacancy.

That writ must include a date, but it appears that the Illinois legislature has provided only one date from which Governor Quinn may choose: November 2, 2010.

The plaintiffs would like us to rule that the provision of the Illinois Election Code governing senate vacancies, 10 ILCS 5/25-8, is unconstitutional because it *prevents* Governor Quinn from choosing an earlier date, and thus from allowing the people to be represented by an elected Senator rather than a temporary appointee. We have already concluded, however, that this issue is not properly before us, and so we express no opinion on that aspect of Illinois's system.

We note, however, that the Illinois statute does not expressly prevent the governor from issuing a writ of election whenever he chooses. Some other states' statutes that concern senate vacancies explicitly prohibit the state executive from issuing a writ in certain circumstances, *e.g.*, CONN. GEN. STAT. ANN. § 9-211(a)(3) (West 2009) (if the vacancy occurs within 62 days of a scheduled election, "the Governor shall not issue such writs and no election shall be held"), but the Illinois statute contains nothing close to the prohibitory language used by these laws. Nor does the Illinois statute appear to command the governor to issue a writ of election. While it is true that some state laws explicitly require the writ to issue, *e.g.*, FLA. STAT. ANN. § 100.161, such a statutory command to the state executive is not necessary. The language of the Seventeenth Amendment is enough on its own to authorize the executive's action, no matter what state law says or does not say. It is enough that the plain language of 10 ILCS 5/25-8 does not seem to interfere

with the governor's constitutional obligation to issue a writ.

This is not to say that the plaintiffs' concern that a vacancy election may not happen is misplaced. Such an event would be far from unprecedented. Based on our review of U.S. Senate historical documents, there were 193 vacancies in the Senate between the ratification of the Seventeenth Amendment and the election of President Obama (excluding vacancies caused by a senator's leaving office after a successor is regularly elected). See Senate Historical Office, Senators of the United States 1789-2009 (Feb. 2010), http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf (last visited June 15, 2010); BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222 (2005), updated version at http://bioguide.congress.gov/biosearch/biosearch.asp (last visited June 15, 2010). Twenty-seven of those vacancies were filled by an appointee who served the remainder of the senate term in question; in those 27 cases, the election to fill the senate vacancy that is required by the Seventeenth Amendment never took place. (Notably, there was never an election to fill the vacancy that was the subject of *Valenti v. Rockefeller*, *supra*.)

Even though Illinois law appears to set a date for an election to fill a vacancy in the Senate, and Governor Blagojevich's certificate of appointment provided that Senator Burris was to serve "until the vacancy . . . is filled by election as provided by law," the plaintiffs and the Illinois executive branch have taken the position that Senator Burris will remain in office until the next Congress convenes on January 3, 2011. The defendants

did not dispute that Senator Burris's tenure will last this long in their briefs or at oral argument. This supports the plaintiffs' argument that President Obama's vacant senate seat may be occupied during the lame-duck session of Congress (November 2, 2010 to January 3, 2011) by a replacement senator who has not been elected by the people. We are not prepared to say that this is such a short period of time that it should be dismissed as *de minimis*. See *Jackson*, 426 F.2d at 1337 ("We are not prepared to say as a matter of law that representation from the time the results of the November . . . election will be determined to January 3 [of the following year] is *de minimis*.").

What is still missing here is a writ of election. Even though the Illinois statute sets November 2, 2010, as the date for the election to fill the Obama vacancy, that does not mean that the writ is superfluous. To the contrary, a writ of election from Governor Quinn would serve the important function of guaranteeing that the people of Illinois may elect a replacement to President Obama's vacant senate seat on the date set by the Illinois legislature. In addition, it would announce to voters that there will be, in effect, two elections on that day—one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress.

No one has raised, and we therefore do not address, the question how the state is to decide whose names should be on the November 2 ballot for the Obama vacancy. The state might propose a solution acceptable to all parties (*e.g.*, using the candidates who have already qualified for the election for the 112th Congress), so long as that solution complies with Illinois and federal

law. We conclude that this issue is better addressed in the first instance by the district court. However Illinois conducts its election for the vacancy, the replacement senator presumably would present his or her credentials to the Senate and take office immediately, while the senator elected to begin service with the 112th Congress would not take office until January 3, 2011.

C

Senator Burris offers a different reason—one based on federal law—why plaintiffs cannot succeed on the merits of their claim. Relying on federal election law, 2 U.S.C. §§ 1, 7-8, and *Foster v. Love*, 522 U.S. 67, 69-74 (1997), he argues that November 2, 2010, is the only date on which Illinois can hold an election to fill President Obama's seat. Because we have decided that the timing of the election is not properly before us, however, we have no comment on this argument.

V

It is not enough for the plaintiffs to show a likelihood of success on the merits. Critically, they must also show why they will suffer irreparable harm if the preliminary injunction they want does not issue. *Winter*, 129 S. Ct. at 375-76. It is there that their case founders. When they decided to abandon their argument that the special election had to occur as soon as practicable, they effectively disclaimed any urgency in the matter that might justify preliminary injunctive relief. Confronted at oral argument, they were unable to suggest any

irreparable harm that they were seeking to avoid. In their reply brief, the plaintiffs address harm in a cursory fashion, which really just reiterates their merits argument. We have made clear in the past that "[i]t is not the obligation of this court to research and construct legal arguments open to parties, especially when they are represented by counsel," and we have warned that "perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) (internal quotation marks omitted). The fact that the plaintiffs leave us essentially in the dark about the irreparable harm that they confront makes it impossible for us to conclude that the district court abused its discretion when it denied the preliminary injunction.

There is still time for the governor to issue a writ of election that will call for an election on the date established by Illinois law and that will make it clear to the voters that they are selecting a replacement for Senator Obama. The district court can easily reach and resolve the merits of this request before any of the harm that the plaintiffs forecast comes to pass. Moreover, circumstances change: Governor Quinn might issue a writ of election tomorrow, or next week.

We detect no irreparable injury that will be avoided through preliminary relief. Bearing in mind that our review is under "the highly deferential abuse of discretion standard," *Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004), we see no reason to upset the district court's decision to deny the preliminary injunction.

We AFFIRM the order of the district court denying preliminary injunctive relief.

APPENDIX B

United States District Court
Northern District of Illinois

Name of Assigned Judge or Magistrate	John F. Grady	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	09 C 1231	**DATE**	April 16, 2009
CASE TITLE	Judge, et al. v. Quinn, et al.		

DOCKET ENTRY TEXT

Governor Quinn's motion to dismiss (19), and Senator Burris's motion to dismiss are granted. The complaint is dismissed. Plaintiffs' motion for a preliminary injunction (14) is denied. Plaintiffs are given until May 1, 2009 to file an amended complaint. If they do not do so, this cause will be dismissed with prejudice. ENTER MEMORANDUM OPINION.

■[For further details attached document.]

Docketing to mail notices.

STATEMENT	
Courtroom Deputy Initials	KM

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

GERALD ANTHONY JUDGE and DAVID KINDLER,	)	
Plaintiffs,	)	
v.	)	No. 09 C 1231
PAT QUINN, GOVERNOR of the STATE OF ILLINOIS and ROLAND W. BURRIS, U.S. SENATOR,	)	
Defendants.	)	

MEMORANDUM OPINION

Before the court are defendants' motions to dismiss the complaint and plaintiffs' motion for a preliminary injunction. We grant defendants' motions and deny plaintiffs' motion for the reasons explained below.

BACKGROUND

The facts alleged in plaintiffs' complaint, which we accept as true for the purposes of defendants' motions, are mostly matters of public record. On November 16, 2008, then-President Elect Obama resigned his Senate

seat, creating a vacancy that former-Illinois Governor Rod Blagojevich filled by executive order appointing defendant Roland Burris. (See Certificate of Appointment, dated December 31, 2008, attached as Ex. A to Pls.' Mem. in Supp. of Mot. for Prelim. Inj. (hereinafter, "Pl. Mem.").)[1] The Certificate of Appointment provides that Senator Burris will serve until the seat is "filled by election as provided by law." (Id.) Under Illinois's Election Code, that election will be held at the next general congressional election in November 2010. See Illinois Election Code, 10 ILCS § 5/25-8. Plaintiffs, registered Illinois voters who intend to vote in the vacancy election, contend that the Seventeenth Amendment requires Governor Quinn to call a special election well in advance of that date. They have filed a two-count complaint, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-02, asking us to (i) declare that § 25-8 is unconstitutional, and (ii) require Governor Quinn to "issue a writ for a special election to be conducted as soon as practical." (First Am. Compl. at 6-7.) We denied Senator Burris' s request to appear as amicus curiae because we concluded that he must be joined as a party under Fed. R. Civ. P. 19. (See Order of Mar. 11, 2009.)[2] Plaintiffs have amended their

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[1] Senator Burris was sworn in as a United States Senator for the State of Illinois on January 15, 2009.

[2] Senator Burris's amicus-curiae motion, which joins Governor Quinn's motion to dismiss with one exception discussed below, stands as his motion to dismiss.

complaint to join him as a defendant, and the parties' motions are now fully briefed.[3]

DISCUSSION

A. Whether the State is Prohibited from Conducting a Vacancy Election on a Date Other Than November 2, 2010.

Senator Burris argues that federal statutes prohibit the state from conducting a vacancy election on any date except November 2, 2010. Because this is an ostensibly non-constitutional basis for denying at least one facet of plaintiffs' claims, we address it first. See Rehman v. Gonzales, 441 F.3d 506, 508 (7th Cir. 2006) ("Non-constitutional arguments always come first; constitutional contentions must be set aside until their resolution is unavoidable."). Article I, § 4, cl.1 of the Constitution authorizes the states to set the "Times, Places and Manner of holding Elections for Senators," but "only so far as Congress declines to preempt state legislative choices." Foster v. Love, 522 U.S. 67, 69 (1997); see U.S. CONST. Art. I, § 4, c.1 (authorizing Congress to "make or alter" congressional-election regulations, "except as to the places of choosing senators"). Congress requires states to conduct Senate

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[3] We have jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), and we concur with the parties' apparent agreement that plaintiffs have standing. See Valenti v. Rockefeller, 292 F.Supp. 851, 853 n.1 (W.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 405 (1969) (concluding that New York voters had standing to challenge the state's vacancy statute under the Seventeenth Amendment).

elections on the "Tuesday next after the 1st Monday in November" preceding the date when the incumbent Senator's term expires. See 2 U.S.C. §§ 1, 7. Senator Burris argues that these provisions apply to Senate vacancy elections. We disagree. Section 1 applies only to the regularly scheduled Senate election preceding the end of the incumbent's term in office. See 2 U.S.C. § 1 ("At the regular election held in any State *next preceding the expiration of the term for which any Senator was elected* to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen . . . .") (emphasis added). A separate provision authorizes states to prescribe the "time" for filling vacancies by election, including vacancies caused by resignation. See 2 U.S.C. § 8.[4] Section 8 refers only to "Representative[s]" and "Delegate[s]," but it has been construed to apply by implication to Senators as well. See Public Citizen v. Miller, 813 F.Supp. 821, 829 n.8 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993); see also Foster, 522 U.S. at 71 n.3 (citing Public Citizen with approval). This

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[4] Section 8 provides, with an exception that does not apply in this case:

> [T]he time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See 2 U.S.C. § 8.

provision authorizes the states to conduct vacancy elections on dates other than the date dictated by 2 U.S.C. §§ 1 and 7. See Public Citizen, 813 F.Supp. at 830; Busbee v. Smith, 549 F.Supp. 494, 524-25 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).[5] Foster v. Love struck down Louisiana's "open primary" system, which in most instances led to the election of a Senator and/or Representative in the October preceding the November federal election. Foster, 522 U.S. at 70. It did not involve a vacancy created by resignation, and does not control the outcome of this case. We reject Senator Burris' s argument that a vacancy election can only be held on November 2, 2010.[6]

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[5] See also Trinsey v. Commonwealth of Pennsylvania, 941 F.2d 224, 226 (3d Cir. 1991) (upholding a statute requiring the Governor of Pennsylvania to declare a special election to fill a Senate vacancy in an odd-numbered year); Valenti, 292 F.Supp. at 855 (assuming without discussion that New York had authority to schedule a Senate vacancy election in an odd-numbered year). In authorizing a vacancy election on a date other than federal election day these cases appear to rely on the Seventeenth Amendment's vacancy clause rather than 2 U.S.C. § 8. Cf. Newberry v. United States, 256 U.S. 232, 252 (1921) ("As finally submitted and adopted the [Seventeenth Amendment] does not undertake to modify article 1, § 4, the source of congressional power to regulate the times, places and manner of holding elections."). But the result is the same whether this case is governed by § 8, the Seventeenth Amendment, or the states' default authority under Art. I, § 4, c.1 — a vacancy election may be conducted on a date other than federal election day.

[6] Senator Burris argues for the first time in his reply brief that pursuant to Article I, § 5 of the (continued...)

B. The Seventeenth Amendment and Illinois's Vacancy Statute

Before the states ratified the Seventeenth Amendment in 1913, United States Senators were appointed by state legislatures. See Laura A. Little, An Excursion Into the Uncharted Waters of the Seventeenth Amendment, 64 Temp. L. Rev. 629, 632 (1991). The Seventeenth Amendment eliminated that practice, providing for direct elections and prescribing the procedure for filling vacancies:

(...continued)
Constitution only the Senate can "determine whether a special election is appropriate to curtail his present tenure." See U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."). Arguments raised for the first time in a reply brief are waived. See United States v. Diaz, 533 F.3d 574, 577 (7th Cir. 2008). And despite his argument's sweeping implications, Senator Burris has not cited any case law construing Article I, § 5. See United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)."). Even overlooking these defects, we are not persuaded that a special election would encroach upon the Senate's authority under Article I, § 5. See Roudebush v. Hartke, 405 U.S. 15, 25-26 (1972) (concluding that Indiana's recount procedures did not "usurp" the Senate's authority under Article I, § 5 because the Senate would ultimately decide which individual would be seated).

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. CONST. amend. XVII. Illinois, pursuant to the proviso, enacted the following vacancy statute soon after the states ratified the Seventeenth Amendment:

> When a vacancy shall occur in the office of United States Senator from this state, *the Governor shall make temporary appointment to fill such* vacancy *until the next election of representatives in Congress*, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

10 ILCS § 5/25-8 (emphasis added). Plaintiffs contend that this statute is unconstitutional because it usurps the governor's duty to call a special election, authorizes an impermissibly long period of time between the vacancy and the election, and compels (rather than "empowers") the governor to make a temporary

appointment in the interim.[7] They rely in part on cases construing Article I, §2, cl.4, which governs the procedure for filling vacancies in the United States House of Representatives and contains language nearly identical to the Seventeenth Amendment's "writs-of-election" clause. See U.S. Const. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority shall issue Writs of Election to fill such Vacancies."); Jackson v. Ogilvie, 426 F.2d 1333, 1336 (7th Cir. 1970) (concluding that the "writs-of-election" clause is mandatory and requires the governor to call a special election, subject to procedural rules set by the state legislature); American Civil Liberties Union v. Taft, 385 F.3d 641, 649 (6th Cir. 2004) (similar). That provision does not contain anything comparable to the Seventeenth Amendment's proviso, but plaintiffs argue that the proviso should be read narrowly to preserve the meaning of the writs-of-election clause as interpreted by Jackson and Taft. According to plaintiffs, the phrase "as the legislature directs" applies only to the procedures

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[7] Plaintiffs raised this last objection, which appears to be an issue of first impression, in what was effectively their reply brief supporting their preliminary-injunction motion. It is an entirely new and separate claim challenging Senator Burris' s appointment, not the vacancy election's timing. And like Senator Burris's untimely argument, *supra* n.6, plaintiffs' new claim may raise significant standing and justiciability issues. These issues are undeveloped, at best, and defendants have not had an opportunity to be heard. If plaintiffs wish to pursue this claim in light of today's ruling, they should file an amended complaint. For purposes of the pending motions, we address only the operative complaint in this case.

governing the special election (ballot access, voter registration, etc.) and not when (or whether) there will be a special election.

C. Valenti v. Rockefeller

Both parties acknowledge that Valenti v. Rockefeller is central to this case. In Valenti, a three-judge district court concluded that a New York statute similar to § 25-8 was constitutional, 292 F.Supp. at 853, a decision that the United States Supreme Court summarily affirmed without an opinion. See Valenti v. Rockefeller, 393 U.S. 405 (1969). The vacancy in Valenti was created by Senator Robert Kennedy's assassination, which occurred fewer than 60 days prior to New York's spring primary in an even-numbered year. Id. at 854. Under New York election law, this meant that the vacancy would be filled at the general election in the next even-numbered year (November 1970), approximately 29 months after the vacancy arose. Id. The Valenti court rejected the plaintiffs' contention that Seventeenth Amendment's "proviso only allows the legislature to regulate the governor's power of temporary appointment and not the timing of vacancy elections." Id. at 855. A "natural reading" of the Amendment "grants the states some reasonable degree of discretion concerning both the timing of vacancy elections and the procedures to be used in selecting candidates for such elections." Id. at 856.[8] In reaching

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[8] In their supplemental memorandum plaintiffs argue that Valenti did not decide which branch of state government is authorized to set the date for the vacancy (continued...)

this conclusion, the court expressly rejected the argument that the Seventeenth Amendment requires a special election. Id. (If the drafters had intended to require a special election, "it is likely that they would have employed clear language to that effect."). But the court also concluded that the legislature's discretion to schedule a vacancy election is not unlimited: "a Governor may make only a '*temporary*' appointment until an election is held." Id. (emphasis added). The question, then, was whether New York's vacancy statute exceeded "the limits of the discretion conferred upon the states by the Amendment." Id. Surveying other state vacancy statutes, including that of Illinois, the court concluded that they "reflect a consensus of the states that it is permissible for a 'temporary' appointee to hold office until the next regular congressional election before which there remains sufficient time to

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(...continued)
election. They point out that Governor Rockefeller issued a writ of election and they insist that he, not New York's legislature, scheduled the election for November 1970. (See Mot. on Behalf of Appellee to Dismiss or Affirm, attached as Ex. H to Pl.'s Supp. Mem. in Support of its Mot. for Prelim. Inj., at 6.) We disagree with plaintiffs' contention that Valenti did not address the "who-decides-the-date" issue. November 1970 was the date dictated by the statute pursuant to which Governor Rockefeller appointed Senator Kennedy's replacement. See Valenti, 292 F. Supp. at 854-55. Here, then-Governor Blagojevich appointed Senator Burris to serve until an election is held "as provided by law." In both cases, the state legislature enacted a statute setting the election's date and the governor issued an order complying with the statute. Valenti holds that the Seventeenth Amendment permits this procedure.

nominate candidates and conduct a campaign." Id.; see also Smiley, 285 U.S. at 369 (observing that "long and continuous interpretation in the course of official action under the law" is persuasive evidence of the law's meaning). New York's statute, and statutes like it, further "substantial state interests" by scheduling vacancy elections when "voter interest and turnout are at a maximum," and when it is most efficient and economical for candidates, who would otherwise have to raise money during an off-year, and for the state itself. Id.

Plaintiffs insist that the Supreme Court's summary affirmance in Valenti has "limited precedential force." See Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979) ("[S]ummary affirmances have considerably less precedential value than an opinion on the merits."); see also Fusari v. Steinberg, 419 U.S. 379, 391-92 (1976) (Burger, C.J., concurring) (specifically cautioning lower courts against relying too heavily on summarily affirmed opinions of three-judge district courts). They point out that in Governor Rockefeller's motion to dismiss or affirm he argued, among other things, that the appeal was moot because it was not possible to grant the relief that the plaintiffs had requested in their complaint — i.e., an injunction requiring that voters be given the opportunity to fill the vacancy at the November 5, 1968 election. (See Mot. on Behalf of Appellee to Dismiss or Affirm, attached as Ex. H to Pl.'s Supp. Mem. in

Support of its Mot. for Prelim. Inj., at 8.)[9] Plaintiffs argue we should assume that the Court affirmed the judgment on that ground and not on the three-judge panel's decision resolving the constitutional question, effectively clearing the way for a contrary ruling. See Mandel v. Bradley, 432 U.S. 173, 179-90 (1977) (Brennan, J., concurring) ("The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible.").

We are not persuaded that Valenti affirmed the district court's judgment on mootness grounds,[10] and

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[9/] The three-judge panel in Valenti conceded that it could not, as a practical matter, grant plaintiffs this relief given the lawsuit's timing, id. at 855 n.6, but concluded that this did not moot the case. Id. at 855 (considering whether New York was prohibited from "bypassing its general election in 1969 in favor of filling the vacancy in November 1970").

[10/] Neither side has cited any facts or authority that would enable us to meaningfully assess whether Governor Rockefeller's mootness argument was a plausible ground for affirmance. But if, as Governor Rockefeller argued, the plaintiff was constrained by the relief he had requested in his complaint (cf. Fed.R. Civ. P. 54(c)), then the case was moot when the lower court rendered its decision. In that case, the Court likely would have dismissed the appeal and vacated, not affirmed, the lower court's judgment. See Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of America, Division 998 v. Wisconsin Employment Relations Board, 340 U.S. 416, 418 (1951) ("A federal court is without power to decide moot questions or to give advisory opinions which (continued...)

contrary to what plaintiffs seemed to suggest in their opening brief, we are not writing on a blank slate. The Court revisited Valenti in Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982), a case challenging the constitutionality of Puerto Rico's statutes authorizing political parties to appoint interim replacements for their members who vacate seats in Puerto Rico's legislature. "[W]hen a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, 'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'" Id. at 10 (quoting Dunn v. Blumenstein, 405 U.S. 330, 336 (1972)). The Court noted that in Valenti it had found "nothing invidious or arbitrary" in the fact that, at any given time, some Senators hold office "by virtue of popular election" and others "by virtue of interim appointment." Id. at 11. The Court went on to quote the majority opinion in Valenti: "[i]n this case we are confronted with no fundamental imperfection in the functioning of democracy . . . . We have, rather, only the unusual,

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(...continued)
cannot affect the rights of the litigants in the case before it.") (internal citations and quotation marks omitted); see also 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 3533.10 (3d Ed. 2008) ("No difficulty is encountered if an action is moot at the time of the lower court's decision — any decision on the merits is vacated, even if the trial court both ruled that the action was moot and alternatively addressed the merits."). Moreover, the Seventeenth Amendment question was squarely presented in the appellant's jurisdictional statement. See Statement of Jurisdiction, 1968 WL 112482, *4; cf. Illinois State Board of Elections, 440 U.S. at 182.

temporary, and unfortunate combination of a tragic event and a reasonable statutory scheme." Id. (quoting Valenti, 292 F.Supp. at 867). The Court conceded that Valenti was not controlling, but nevertheless concluded that the decision was relevant and persuasive:

> Valenti, of course, unlike this case, involved an interpretation of the Seventeenth Amendment, which explicitly outlines the procedures for filling vacancies in the United States Senate. See n. 7, *supra*. However, the fact that the Seventeenth Amendment permits a state, if it chooses, to forego a special election in favor of a temporary appointment to the United States Senate suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature.

Id. Our Court of Appeals relied on this same language in a case decided shortly after Rodriguez upholding a comparable provision applying to aldermanic vacancies. See Lynch v. Ill. State Board of Elections, 682 F.2d 93, 96 (7th Cir. 1982) ("Rodriguez and Valenti clearly show that section 3-2-7 is not constitutionally infirm. Both decisions sustain the authority to fill vacancies in elective offices by appointment, even though the appointee will hold office for the duration of the term.").

Although the Rodriguez Court discussed Valenti in dicta, we cannot lightly disregard the Supreme Court's "considered" statements. See United States v. Bloom, 149 F.3d 649, 653 (7th Cir. 1998) ("It would ill serve the interests of litigants and the judicial system as a whole

to row against the tide of such statements."). The analogy in Rodriguez to Valenti and the Seventeenth Amendment was not "an aside unrelated to the subject matter of the case," id. — the parties briefed the issue and it played a meaningful role in the Court's reasoning. See Rodriguez, 457 U.S. at 11 (The procedure that the Court "sustained" in Valenti to fill Senate vacancies "suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature."). Rodriguez and Valenti squarely contradict plaintiffs' textual interpretation, pursuant to which they argue that Illinois *cannot* "forgo a special election in favor of a temporary appointment." Id.; cf. Jackson, 426 F.2d at 1336. Rodriguez also confirms that the Court was not troubled by the length of the 29-month delay between the vacancy and the election in Valenti. Id. at 10-11 (citing the Court's affirmance and observing that it had "sustained the authority of the Governor of New York to fill a vacancy in the United States Senate by appointment pending the next regularly scheduled congressional election — in that case, a period of over 29 months").

Because the vacancy in this case arose shortly after President Obama' s election on November 4, 2008, nearly two years will elapse before the vacancy is filled by election. This is nearly the longest delay that § 25-8 permits, and still it is well within the period that Valenti allowed. Moreover, the principle that it is more efficient and economical to conduct multiple elections on the same date remains sound. See Lynch, 682 F.2d at 97 (eliminating special elections for aldermanic vacancies furthered the state's interest in reducing election costs and maximizing voter turnout). Plaintiffs

respond that there are competing considerations specific to Senator Burris's appointment, and not raised by Valenti's facts, that justify a different result. At the time that he appointed Senator Burris, then-Governor Blagojevich was charged with serious crimes stemming, in part, from his alleged attempts to "sell" President Obama's vacated Senate seat. Plaintiffs argue that the Seventeenth Amendment was adopted, in part, to deter this sort of corruption. See Little, *supra*, at 639-40. But the constitutional standard that they advocate, whereby a state statute may or may not violate the Seventeenth Amendment depending upon the circumstances surrounding a particular appointment, is misguided and unworkable. Under Valenti, Illinois's statutory scheme is reasonable; the fact that the circumstances of this particular appointment have become one of the subjects of a criminal indictment is constitutionally irrelevant.

Applying Valenti and Rodriguez, we conclude that § 25/8 does not violate plaintiffs' right under the Seventeenth Amendment to vote in the direct election of their Senator. Accordingly, they are not entitled to a declaratory judgment to the contrary. And because the allegations in their First Amended Complaint do not state a constitutional violation, plaintiffs are not entitled to injunctive relief under § 1983. Defendants' motions to dismiss are granted.

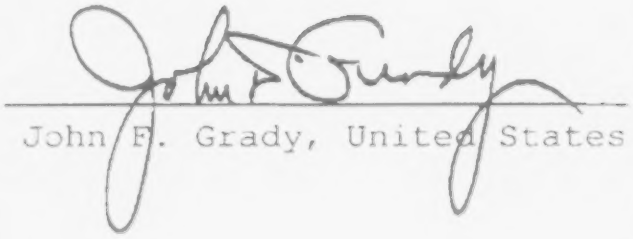
CONCLUSION

Governor Quinn's motion to dismiss (19), and Senator Burris's motion to dismiss (23), are granted. The complaint is dismissed. Plaintiffs' motion for a preliminary injunction (14) is denied. Plaintiffs are

given until May 1, 2009 to file an amended complaint. [11] If they do not do so, this cause will be dismissed with prejudice.

DATE: April 16, 2009

ENTER:



11/ See *supra* n.7.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 22, 2010

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 09-2219

GERALD A. JUDGE and DAVID KINDLER, *Plaintiffs-Appellants*, *v.* PATRICK J. QUINN, Governor of the State of Illinois, and ROLAND W. BURRIS, U.S. Senator, *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois No. 09 C 1231 John F. Grady, *Judge*

ORDER

On June 28, 2010, Defendant-Appellee Patrick J. Quinn filed a "Motion to Amend Opinion or, in the Alternative, Petition for Rehearing *En Banc*, of Defendant-Appellee Patrick J. Quinn, Governor of the State of Illinois." As ordered by the court, Plaintiffs-Appellants filed their response to that motion on July 7, 2010. The court construes the motion as a petition for rehearing or rehearing *en banc*.

On consideration of the petition, so understood, all of the judges on the original panel have voted to deny rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc*. It is therefore ORDERED that the petition for rehearing *en banc* is DENIED.

It is further ORDERED that the opinion of the court is revised as follows. On page 38, line 19 ***[see p. 38a, line 2 of Appendix A]***, the following language is deleted:

> However Illinois conducts its election for the vacancy, the replacement senator presumably would present his or her credentials to the Senate and take office immediately, while the senator elected to begin service with the 112th Congress would not take office until January 3, 2011.

In its place, the following two new paragraphs are added:

The district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely. It is elementary that the Seventeenth Amendment's requirement that a state governor issue a writ of election to guarantee that a vacancy in the state's senate delegation is filled by an election is an aspect of the supreme law of the land. U.S. CONST. art VI, cl. 2. To the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield. See *Rice v. Cayetano,* 528 U.S. 495 (2000) (holding that state-law rules governing elections of trustees to the Office of Hawaiian Affairs violated the Fifteenth Amendment); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (striking down state-law durational residency requirements as unconstitutional under the Fourteenth Amendment); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966) (holding that state-law poll taxes violated the Fourteenth Amendment).

However Illinois conducts its election for the vacancy, the state should endeavor to certify the results of that election as soon as possible, so that the replacement

> senator may present his or her credentials to the Senate and take office promptly. The senator elected to begin service with the 112th Congress will take office as the Constitution provides on January 3, 2011. U.S. CONST. amend. XX, sec. 1.

In all other respects, the petition for rehearing is DENIED.